IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM,

Plaintiff,

v.

ALTOLEW, INC., a foreign corporation; and TOMMY TUTEN, an individual,

Defendants.

No. 91-C-273-B

FILED

JUN 20 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the Motion to Dismiss, or in the alternative, to Transfer filed by the defendants, Altolew, Inc. ("Altolew") and Tommy Tuten ("Tuten").

On October 11, 1968, Altolew entered into a License Agreement with Stemmons, Inc., the predecessor in interest of Thrifty Rent-A-Car System, Inc. ("Thrifty"). The License Agreement granted Altolew the right to operate a Thrifty Car Rental franchise within a specific area in South Carolina and Georgia. The License Agreement was amended on three occasions resulting in the designation of the franchise area as solely within the state of Georgia. The License Agreement has been in continuous effect from October 11, 1968 until April 12, 1991, the date Thrifty terminated the agreement.

Pursuant to the License Agreement, Altolew and Thrifty entered into a Master Lease Agreement ("Vehicle Lease Agreement") which provides for the leasing of vehicles from Thrifty to be used in the operation of the Thrifty franchise. Under the Vehicle Lease Agreement, Altolew was to send all notices, monthly rental

payments, and vehicle lease order forms to Thrifty in Tulsa.

Both the License Agreement and the Vehicle Lease Agreement provide that the laws of Oklahoma govern their interpretation and construction.

Tuten is the present president and sole shareholder of Altolew and has been involved with Altolew since the License Agreement was executed in 1968. Tuten signed the Vehicle Lease Agreement, individually and as Altolew's representative. Tuten also personally guaranteed Altolew's obligations under the Vehicle Lease Agreement.

Defendants argue that the case should be dismissed because the Court lacks personal jurisdiction over Altolew and Tuten, or in the alternative, that the case should be transferred pursuant to 28 U.S.C. § 1404(a).

In personam jurisdiction having been challenged, Plaintiff has the burden of establishing the nonresident defendants have the necessary minimum contacts with the forum that maintenance of the suit "does not offend traditional notions of fair play and substantial justice." Ten Mile Industrial Park v. Western Plains Service Corp., 810 F.2d 1518, 1524 (10th Cir. 1987); International Shoe Company v. Washington, 326 U.S. 310 (1945); Hanson v. Denckla, 357 U.S. 235 (1958). The law of the forum state governs the federal court's exercise of jurisdiction over the person which, in Oklahoma, must be consistent with federal and state constitutional standards. Rambo v. American Southern Insurance Co., 839 F.2d 1415, 1416 (10th Cir. 1988); 12 Okla.Stat. §2004(F).

The plaintiff has met its burden. In Burger King v.

Rudzewicz, 471 U.S.462 (1985), the Supreme Court found a "substantial connection" between the franchisee and the state in which the franchisor established its principal office. The Court noted that the franchisor and the franchisee entered into a long-term relationship which "envisioned continuing and wide-reaching contacts" with the state in which the franchisor's headquarters was located. Burger King. 471 U.S. at 480. Similarly, Altolew has operated a franchise of Thrifty (or its predecessor, Stemmons, Inc.) for twenty-two years. During the twenty-two year relationship, Altolew and Tuten have carried on a continuous course of direct communications by mail or telephone with Thrifty's headquarters in Tulsa, Oklahoma, concerning the operation of the franchise. All lease and license payments have been sent to Thrifty's Tulsa office over the term of the License and Vehicle Lease Agreements. Like the franchise agreement in Burger King, both agreements contain a choice of law provision. The Supreme Court in Burger King reasoned that a choice of law provision in light of a long-term contractual relationship between the franchisor and franchisee "reinforce[s] [a] deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there." Burger King, 471 U.S. at 482. Furthermore, Tuten individually signed and personally guaranteed the Vehicle Lease Agreement and several Vehicle Order Forms. The guarantees secured performance in Oklahoma and there has been partial performance of the guarantees in Oklahoma. Even if Tuten had not made sufficient contacts in his corporate capacity as president and sole

shareholder of Altolew, his acts as guarantor establish minimum contacts with Oklahoma. Standard Life and Accident Insurance Co. v. Western Finance, Inc., 436 F. Supp. 843 (W.D. Okla. 1977). In light of the above, the Court finds that Altolew and Tuten have established sufficient contacts with Oklahoma to allow this Court to exercise jurisdiction over them. The Court, therefore, denies the defendants' motion to dismiss.

The Court further concludes that the defendants have failed to meet their burden to show that a transfer is warranted under 28 U.S.C. § 1404(a) due to the inconvenience of the parties or witnesses, or in the interests of justice. The defendants have not submitted any affidavits supporting their claim of inconvenience. Relevant records concerning this dispute are located in Tulsa, as well as Georgia, and many of Thrifty's anticipated witnesses are in Tulsa. As the plaintiff's choice of forum should be afforded deference, and the License and Vehicle Lease Agreement provide that Oklahoma law governs their interpretation, the Court denies the defendants' motion to transfer. Thrifty Rent-A-Car System, Inc. v. Bettinger et al., Case No. 90-C-469-B (N.D. Okla. May 24, 1991).

IT IS SO ORDERED, this 19 day of June, 1991.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

U.S. DIST. COURT

DANNY DEAVER, et al.,

Plaintiffs,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, et al.,

Defendants.

No. 90-C-269-C

JUDGMENT

This matter came before the Court for consideration of defendant's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for defendant Misscuri Pacific Railroad Company, and against plaintiff Danny Deaver.

IT IS SO ORDERED this 19th day of June, 1991.

H. DALE COOK
Chief Judge, U. S. District Court

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE UNKNOWN HEIRS, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS OF MARY H. LEE a/k/a MARY LETHA LEE, Deceased; PAULA RAY COLLINS, Individually and as Administratrix of the Estate of Mary Letha Lee a/k/a Mary H. Lee; DENNIS RAYFORD HINKLE; GARY DEAN HINKLE; HOWARD RAY LEE, JR.; COUNTY TREASURER, Nowata County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Nowata County, Oklahoma,

Defendants.

FILED

JUN 20 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 90-C-727-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 20 day of June, 1991. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, County Treasurer, Nowata County, Oklahoma, and Board of County Commissioners, Nowata County, Oklahoma, appear by Carl G. Gibson, Assistant District Attorney, Nowata County, Oklahoma; the Defendant, Howard Ray Lee, Jr., appears not, having previously filed his Disclaimer; and the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Mary H. Lee a/k/a Mary Letha Lee, Deceased; Paula Ray Collins, Individually and as Administratrix of the Estate of Mary Letha Lee a/k/a Mary H. Lee; Dennis Rayford Hinkle; and Gary Dean Hinkle, appear not, but make default.

The Court being fully advised and having examined the court file finds that Defendant, Gary Dean Hinkle, acknowledged receipt of Summons and Complaint on October 5, 1990; that Defendant, County Treasurer, Nowata County, Oklahoma, acknowledged receipt of Summons and Complaint on September 10, 1990; and that Defendant, Board of County Commissioners, Nowata County, Oklahoma, acknowledged receipt of Summons and Complaint on August 27, 1990.

The Court further finds that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Mary H. Lee a/k/a Mary Letha Lee, Deceased; Paula Ray Collins, Individually and as Administratrix of the Estate of Mary H. Lee a/k/a Mary Letha Lee; and Dennis Rayford Hinkle, were served by publishing notice of this action in the Nowata Star, a newspaper of general circulation in Nowata County, Oklahoma, once a week for six (6) consecutive weeks beginning February 7, 1991, and continuing through March 14, 1991, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c) and 84 O.S. § 260. Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Mary H. Lee a/k/a Mary Letha Lee, Deceased; Paula Ray Collins, Individually and as Administratrix of the Estate of Mary H. Lee a/k/a Mary Letha Lee; and Dennis Rayford Hinkle, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said

Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Mary H. Lee a/k/a Mary Letha Lee, Deceased; Paula Ray Collins, Individually and as Administratrix of the Estate of Mary H. Lee a/k/a Mary Letha Lee; and Dennis Rayford Hinkle. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Farmers Home Administration, and its attorneys, Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that Defendants, County Treasurer, Nowata County, Oklahoma, and Board of County Commissioners, Nowata County, Oklahoma, filed their Answer on September 26, 1990; that Defendant, Howard Ray Lee, Jr., filed his Entry of Appearance, Answer and Disclaimer on September 7, 1990; and that Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees,

Successors and Assigns of Mary H. Lee a/k/a Mary Letha Lee, Deceased; Paula Ray Collins, Individually and as Administratrix of the Estate of Mary Letha Lee a/k/a Mary H. Lee; Dennis Rayford Hinkle; and Gary Dean Hinkle, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain promissory note and for foreclosure of a mortgage securing said promissory note upon the following described real property located in Nowata County, Oklahoma, within the Northern Judicial District of Oklahoma:

> The North 15 feet of Lot 15, All of Lot 16, and The South 20 feet of Lot 17, in Block 6, Lawson and Scoville Addition to the City of Nowata, Oklahoma.

The Court further finds that this is a suit brought for the further purpose of judicially determining the death of Mary H. Lee a/k/a Mary Letha Lee and of judicially determining the heirs of Mary H. Lee a/k/a Mary Letha Lee.

The Court further finds that Mary H. Lee a/k/a Mary Letha Lee (hereinafter referred to by either of these names) became the record owner of the real property involved in this action, by virtue of that certain General Warranty Deed dated December 6, 1978, which was filed in the records of the County Clerk of Nowata County, Oklahoma, on December 14, 1978, in Book 501, Page 598.

The Court further finds that Mary H. Lee a/k/a Mary Letha Lee died intestate on May 10, 1985, in Nowata County, Oklahoma. Upon the death of Mary H. Lee a/k/a Mary Letha Lee the subject property vested in Paula Ray Collins, Dennis Rayford Hinkle, Gary Dean Hinkle, and Howard Ray Lee, Jr., as named heirs

in the Order For Issuance of Letters of Administration, Probate Case No. P-85-19, filed in the District Court, Nowata County, State of Oklahoma, on May 28, 1985. This probate is still pending; therefore, the heirs of Mary H. Lee a/k/a Mary Letha Lee must be judicially determined. The Certificate of Death No. 10720 was issued by the Oklahoma State Department of Health certifying Mary Letha Lee's death.

The Court further finds that on December 14, 1978, Mary H. Lee, now deceased, executed and delivered to the United States of America, acting through the Farmers Home Administration, her promissory note in the amount of $11,000.00, payable in monthly installments, with interest thereon at the rate of eight and one-half percent (8.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Mary H. Lee, now deceased, executed and delivered to the United States of America, acting through the Farmers Home Administration, a mortgage dated December 14, 1978, covering the above-described property. Said mortgage was recorded on December 14, 1978, in Book 501, Page 600, in the records of Nowata County, Oklahoma.

The Court further finds that Mary H. Lee a/k/a Mary Letha Lee, now deceased, made default under the terms of the aforesaid note and mortgage by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of $10,558.68, plus accrued interest in the amount

of $1,106.48 as of July 28, 1989, plus interest accruing thereafter at the rate of 8.5 percent per annum or $2.4589 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $586.20 ($20.00 docket fees, $558.20 publication fees, $8.00 fee for recording Notice of Lis Pendens).

The Court further finds that Plaintiff is entitled to a judicial determination of the death of Mary H. Lee a/k/a Mary Letha Lee and to a judicial determination of the heirs of Mary H. Lee a/k/a Mary Letha Lee.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Nowata County, Oklahoma, have a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $33.45, plus penalties and interest, for the year 1990. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, County Treasurer and Board of County Commissioners, Nowata County, Oklahoma, have a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $8.73 which became a lien on the property as of 1990. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Howard Ray Lee, Jr., disclaims any right, title or interest in the subject real property.

The Court further finds that the The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Mary H. Lee a/k/a Mary Letha Lee, Deceased; Paula Ray Collins, Individually and as Administratrix of the Estate of Mary Letha Lee a/k/a Mary H. Lee; Dennis Rayford Hinkle; and Gary Dean Hinkle, are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem in the principal sum of $10,558.68, plus accrued interest in the amount of $1,106.48 as of July 28, 1989, plus interest accruing thereafter at the rate of 8.5 percent per annum or $2.4589 per day until judgment, plus interest thereafter at the current legal rate of 6.09 percent per annum until fully paid, plus the costs of this action in the amount of $586.20 ($20.00 docket fees, $558.20 publication fees, $8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the death of Mary H. Lee a/k/a Mary Letha Lee be and the same is hereby judicially determined to have occurred on May 10, 1985, in the City of Nowata, County of Nowata, State of Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the only known heirs of Mary H. Lee a/k/a Mary Letha Lee are Paula Ray Collins, Dennis Rayford Hinkle, Gary Dean Hinkle, and Howard

Ray Lee, Jr. and despite the exercise of due diligence by Plaintiff and its counsel no other known heirs of Mary H. Lee a/k/a Mary Letha Lee, Deceased, have been discovered and it is hereby judicially determined that Paula Ray Collins, Dennis Rayford Hinkle, Gary Dean Hinkle, and Howard Ray Lee, Jr. are the only known heirs of Mary H. Lee a/k/a Mary Letha Lee, Deceased, and that Mary H. Lee a/k/a Mary Letha Lee, Deceased, has no other known heirs, executors, administrators, devisees, trustees, successors and assigns; and the Court approves the Certificate of Publication and Mailing filed by Plaintiff regarding said heirs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Nowata County, Oklahoma, have and recover judgment in the amount of $33.45, plus penalties and interest, for ad valorem taxes for the year 1990, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Nowata County, Oklahoma, have and recover judgment in the amount of $8.73 for personal property taxes for the year 1990, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Mary H. Lee a/k/a Mary Letha Lee, Deceased; Paula Ray Collins, Individually and as Administratrix of the Estate of Mary H. Lee a/k/a Mary Letha Lee; Dennis Rayford Hinkle; Gary Dean Hinkle; and Howard Ray Lee, Jr., have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendants, County Treasurer and Board of County Commissioners, Nowata County, Oklahoma, in the amount of $33.45, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:

In payment of Defendants, County Treasurer and Board of County Commissioners, Nowata County, Oklahoma, in the amount of $8.73, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney
3600 U.S. Courthouse
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Lewis B. Ambler, OBA# 255
Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Nowata County, Oklahoma

Judgment of Foreclosure
Civil Action No. 90-C-727-E

PP/css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 20 1991
Jack C. Silver, Clerk
U.S. DISTRICT COURT

BONITA B. FLOWERS,

Plaintiff,

vs.

LOUIS W. SULLIVAN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

No. 90-C-476-E

O R D E R

The Court has for consideration the Report and Recommendation of the Magistrate filed January 30, 1991. After careful consideration of the record and the issues, including the briefs and memoranda filed herein by the parties, the Court has concluded that the Report and Recommendation of the Magistrate should be and hereby are adopted by the Court.

IT IS THEREFORE ORDERED that the decision of the Secretary of Health and Human Services is affirmed.

ORDERED this 19TH day of June, 1991.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 20 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

JOHN M. WELLS,

Plaintiff,

vs.

LOUIS W. SULLIVAN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

No. 90-C-592-E

O R D E R

The Court has for consideration the Report and Recommendation of the Magistrate filed March 1, 1991. After careful consideration of the record and the issues, including the briefs and memoranda filed herein by the parties, the Court has concluded that the Report and Recommendation of the Magistrate should be and hereby are adopted by the Court.

IT IS THEREFORE ORDERED that Plaintiff's appeal of the Secretary of Health and Human Services' decision is denied.

ORDERED this 19th day of June, 1991.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

PLANTATION PARTNERS, a General Partnership, Plaintiff, v. STATE FARM FIRE & CASUALTY COMPANY, an Illinois Corporation, licensed to do business in Oklahoma, Defendant.	)	Case No. 91-C-192B

FILED
JUN 20 1991
Jack C. Silver, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL

COME NOW Plaintiff and Defendant, pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), and move this Court to dismis this action with prejudice. In support thereof, Plaintiff and Defendant state that they have both stipulated to this dismissal with prejudice.

Respectfully Submitted,

STEVENS, BRAND, LUNGSTRUM,
GOLDEN & WINTER
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By: William J. Skepnek
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Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DANNY DEAVER, et al.,

Plaintiffs,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, et al.,

Defendants.

No. 90-C-269-C

ORDER

Pending before the Court is the objection filed by the plaintiff, Danny Deaver, to the Report and Recommendation entered by Magistrate Judge Jeffery Wolfe. The Magistrate Judge recommends that the motion for summary judgment filed by defendant, Missouri Pacific Railroad Company, be granted. The Court has independently reviewed the record and finds that the Magistrate Judge's recommendation should be and hereby is affirmed.

Danny Deaver brings this action seeking money damages for the alleged wrongful death of his parents who were killed when their vehicle struck a flatbed railroad car which was parked in a railroad crossing. The Magistrate Judge recommended summary

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judgment in favor of the defendant under the Occupied Crossing Doctrine.[1]

Plaintiff objects and requests this Court to make a judicial determination that the Occupied Crossing Doctrine is no longer viable in Oklahoma because "the basis for its existence has been supplanted by the Doctrine of Comparative Negligence." (Plaintiff's Objection to Report and Recommendation p. 2).[2] There is no indication under existing Oklahoma law that passage of the comparative negligence statute[3] would eliminate the viability of the Occupied Crossing Doctrine. For example, in Oklahoma City-Ada-Atoka Railway Co. v. Nickels, 343 P.2d 1094 (Okla. 1959) the court stated, "When the train enters the crossing first and the plaintiff's automobile then strikes the train, absent unusual circumstances there is no evidence that defendant is guilty of negligence that caused or contributed to the plaintiff's injuries." 343 P.2d at 1099 (emphasis added). The doctrine is founded upon the premise that the presence of the train at the crossing is notice to oncoming traffic and absent "unusual circumstances" the railroad company is under no duty to provide any other notice or

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[1]*Under this doctrine the presence of a train or railroad car on a public crossing is deemed sufficient notice to a motorist of the existence of such obstruction and the railroad is under no duty to provide any other notice of the presence of the train. Kurn v. Jones, 101 P.2d 242,243 (Okla. 1940), and Davis v. Burlington Northern, Inc., 663 F.2d 1028,1030 (10th Cir. 1981).*

[2]*Alternatively plaintiff has also filed a motion to certify this issue to the Oklahoma Supreme Court.*

[3]*23 O.S. §13.*

warning. Missouri-Kansas-Texas Railroad Company v. Hayes, 445 P.2d 254 (Okla. 1968). The recognized defense to the doctrine is a showing of "unusual circumstances."

As a second ground for objection to the Magistrate Judge's recommendation, plaintiff asserts that "unusual circumstances" exist to defeat summary judgment in defendant's favor. It is uncontroverted that the crossing in question was overgrown with weeds, the crossbuck warning sign had fallen down, there were several washed out areas along the tracks and the crossing timbers had deteriorated. Although on the night of the accident it was a clear evening, the area was dimly lite. The surrounding area was industrial and the track in question had not been used by the railroad in approximately two and a half years. From a review of prevailing Oklahoma case law, the Magistrate Judge correctly determined that such circumstances are not considered "unusual" but rather are considered "conditions common to those who travel on the highway." (See, citation of relevant case authority included within the Report and Recommendation of the Magistrate at p.2, f.n.5). Plaintiff's reliance on cases from states other than Oklahoma can not be used as authority for this Court to hold contrary to a well established doctrine under Oklahoma law. Even though in applying the laws of other states, under these facts, summary judgment may be precluded.

The Court therefore affirms the Report and Recommendation of the Magistrate Judge and adopts it as the findings and conclusions of this Court. Accordingly, it is the Order of the Court that the motion of Missouri Pacific Railroad Company for summary judgment against the plaintiff Danny Deaver is hereby granted. This order renders all other pending motions moot.

IT IS SO ORDERED this 19th day of June, 1991.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 20 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

WENDELL GRAYSON,

Plaintiff,

vs.

STEVE HARGETT,

Defendant.

No. 90-C-940-E

O R D E R

The Court has for consideration the Report and Recommendation of the Magistrate filed March 19, 1991. After careful consideration of the record and the issues, including the briefs and memoranda filed herein by the parties, the Court has concluded that the Report and Recommendation of the Magistrate should be and hereby are adopted by the Court.

IT IS THEREFORE ORDERED that Plaintiff's Petition for Writ of Habeas Corpus is denied.

ORDERED this 19th day of June, 1991.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 20 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

FORREST GENE HENDERSON,

Plaintiff,

vs.

RON CHAMPION, et al.,

Defendants.

No. 90-C-356-E

O R D E R

The Court has for consideration the Report and Recommendation of the Magistrate filed March 21, 1991. After careful consideration of the record and the issues, including the briefs and memoranda filed herein by the parties, the Court has concluded that the Report and Recommendation of the Magistrate should be and hereby are adopted by the Court.

IT IS THEREFORE ORDERED that Petition for Writ of Habeas Corpus is denied.

ORDERED this 19th day of June, 1991.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JUN 20 1991
U.S. DISTRICT COURT

FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as Receiver for First National Bank and Trust Company of Cushing, Cushing, Oklahoma	}	
Plaintiff,	}	
vs.	}	No. 90-C-341-C
JERRY CONREY and JOSEPH E. MOUNTFORD,	}	
Defendants.	}	

ORDER

Before the Court is the motion of the Federal Deposit Insurance Corporation (FDIC) for attorney fees against the defendant, Jerry Conrey.

On January 10, 1991, the Court entered judgment in favor of the FDIC in its capacity as Receiver for First National Bank and Trust Company of Cushing, Oklahoma. Judgment was entered based upon default of a note and mortgage executed by Conrey in favor of the bank. These instruments provided for recovery, upon default, of a reasonable attorney fee not to exceed 15% of the amount owing at default.

Counsel for the FDIC has submitted statement itemizing the number of hours expended and the legal service rendered in this action.

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No objection has been filed by the defendant, Jerry Conrey. The Court has reviewed the fee statement and finds that it is reasonable and in conformity with the requirements set forth in State ex rel. Burk v. City of Oklahoma City, 598 P.2d 659 (Okla. 1979).

Accordingly, it is the Order of the Court that the plaintiff, FDIC, is awarded attorney fees in the sum of $17,845.02 over and against the defendant, Jerry Conrey.

IT IS SO ORDERED this 19th day of June, 1991.

H. DALE COOK
Chief Judge, U. S. District Court

FILED
JUN 19 1991
Jack C. Silver, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ACTION SAFETY SUPPLY COMPANY, and, MARYLAND CASUALTY COMPANY, Plaintiffs,	)	
vs.	)	No. 90-C-497-B
LEAR SIEGLER DIVERSIFIED HOLDING CORPORATION, Defendant.	)	

J U D G M E N T

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgement, the Court hereby enters judgment in favor of the Defendant, Lear Siegler Diversified Holding Corporation, and against the Plaintiffs, Action Safety Supply Company and Maryland Casualty Company. Plaintiffs shall take nothing of their claim. Costs are assessed against the Plaintiffs and each party is to pay it respective attorney's fees.

Dated, this 19th day of June, 1990.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 19 1991
Jack C. Silver, Clerk
U.S. DISTRICT COURT

ACTION SAFETY SUPPLY COMPANY, and, MARYLAND CASUALTY COMPANY,

Plaintiffs,

vs.

LEAR SIEGLER DIVERSIFIED HOLDING CORPORATION,

Defendant.

No. 90-C-497-B

ORDER REGARDING MOTION FOR SUMMARY JUDGMENT OF DEFENDANT, LEAR SIEGLER DIVERSIFIED HOLDINGS, REGARDING INTERPRETATION OF CONTRACT.

The Motion for Summary Judgment of Defendant, Lear Siegler Diversified Holdings Corporation (Lear), and the Motion for Summary Judgment of Plaintiffs, Action Safety Supply Company (Action) and Maryland Casualty Company (Maryland), as subrogee, regarding contract interpretation are before the Court for decision. The underlying undisputed facts giving rise to the action are as follows:

On November 22, 1982, Lear entered into a sub-contract with Olympia Contracting Corporation to apply and later remove a temporary center line on a road detour. When the work was completed in 1983, the State of Oklahoma instructed Lear not to remove the lines because they would be paved over with asphalt.

On April 16, 1984, Lear, as "Seller," and Action, a newly formed Oklahoma Corporation, as "Buyer," entered into an Asset Purchase Agreement. The agreement included several paragraphs which set out the terms and circumstances under which the Seller

agreed to indemnify the Buyer for liability the Buyer might incur as a result of the asset purchase.

The Asset Purchase Agreement (Agreement) provides in Paragraph 1.3 that, as of the Closing Date, the Buyer will assume all liabilities and obligations of the Seller whenever incurred, unless specifically excluded in paragraph 1.4 of the Agreement. Paragraph 1.4 provides in part that the Buyer will assume no liability for "any claims for injury to persons or property relating to goods manufactured , shipped, installed or delivered by Seller or goods in the stream of commerce prior to the Closing Date." (See Asset Purchase Agreement attached to Plaintiff's Memorandum in Support of Motion For Summary Judgment, filed May 13, 1991.) The Closing date was April 16, 1984.

On or about June 7, 1984, Clifford R. Bear was killed in a head on collision which allegedly occurred at the location where the sub-contract work had been preformed by Lear. Barbara June Bear, as Personal Representative of the Estate of Clifford R.Bear, brought a wrongful death suit in the district court of Creek County, Oklahoma against Action. Bear alleged Action was negligent in failing to remove the temporary center line.

Action notified Lear Siegler, Inc. of the Creek County litigation by letter dated November 7, 1987. This letter is considered by the parties to be Action's demand for defense and indemnity directed to Lear. Lear refused to accept the demand for defense and indemnity. Consequently, Maryland Casualty Company, Action's insurance carrier, settled all claims against Action for

$80,000.

Action now brings this suit for indemnity against Lear relying on the above mentioned provisions of the Asset Purchase Agreement.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). The Parties have agreed that the facts are undisputed.

This matter presents the following issues:

1. May Paragraph 1.4 of the Agreement, stating, "Goods manufactured, shipped, installed or delivered by seller... prior to the Closing Date," be interpreted so as to include the painting of the temporary center line, provided for in the Lear-Olympia Contract?

2. Must Lear indemnify Action, and therefore, Maryland, for the liability incurred in the Creek County litigation?

Under the Agreement, Action is not required to assume liability for any claims for injury to persons or property relating to goods installed by Lear prior to the closing date, April 16, 1984. Lear completed its work under the Lear-Olympia contract in 1983, prior to the Closing Date of the Agreement, and received final notice of acceptance on January 20, 1984. The question then becomes whether the primary purpose of the Lear-Olympia contract

was to paint a center line on the highway detour or to sell paint.

Action asserts that Lear-Olympia contract was for the sale of paint and, therefore, a sale of goods under paragraph 1.4 of the Agreement. Conversely, Lear asserts that the purpose of the contract was to provide the service of painting the center line and therefore, paragraph 1.4 of the Agreement is inapplicable.

In analyzing the Lear-Olympia contract, it is appropriate to look to the terminology therein to determine the purpose of the contract. A contract must be interpreted so as to give effect to the mutual intention of the parties, as it existed at the time of the contract, so far as the same is ascertainable and lawful. 15 O.S. §152. This is to be deducted from the four corners of the instrument. McEvoy v. First National Bank & Trust Company of Enid, 624 P.2d 559 (Okla. 1980). In considering this point, the court notes the facts stipulated to by both parties concerning the terms of the Lear-Olympia contract:

> Lear ... entered into a contract to do certain work in connection with highway construction... Lear was to **apply** and later **eradicate** a temporary center line on a road detour. This was to be **performed** on a highway...

(Stipulated Facts, filed May 13, 1991.)(Emphasis added.)

The facts as stipulated refer only to the service of painting the line and do not mention the sale of paint. The paint was not sold to the plaintiff as a "good" but was incorporated as a temporary improvement to the highway surface in accordance with the Lear-Olympia contract. See Elizabeth Gamble Deaconess Home Assn. v. Turner Const. Co., 470 N.E.2d 950, 956 (Ohio App. 1984). Although painting a center line on a highway includes the cost of the paint,

it is primarily a service and therefore, is not a contract for "goods" within the meaning of the Oklahoma Uniform Commercial Code.[1] See Pelz Const. Co. v. Dunham, 436 N.E.2d 892 (Ind. App. 1982).

Some courts also consider whether the cause of action centers exclusively on the defective nature of the goods or on the unsatisfactory service performed. See DeGroft v. Lancaster Silo Co., 527 A.2d 1316, 1323 (Md. App. 1987). The Creek County litigation centered on Lear's failure to remove the center line from the highway detour and in no way alleged that the paint was defective in nature. Thus, the cause of action concerned only the alleged negligent service performed in not removing the center line.

Paragraph 1.4 of the Agreement relieves the Buyer of liability only for claims of injury relating to the goods; it does not relieve the Buyer of liability for claims relating to the service of installing the goods. Clifford Bear's injuries were allegedly caused by Lear's failure to remove the center line from the highway

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[1] The Uniform Commercial Code as adopted in Oklahoma, 12A O.S. §2-105, defines "good" as follows:

> (1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).
> (12A O.S. §2-105.)

detour, and not a defect in the paint applied to the highway. Therefore, the claim is not excluded under Paragraph 1.4.

Because paragraph 1.4 is not applicable, paragraph 1.3 is the relevant provision to determine whether Action must assume the liability in the Creek County litigation. Paragraph 1.3 states that the Buyer will assume all liabilities and obligations whenever incurred. (See Asset Purchase Agreement attached to Plaintiff's Memorandum in Support of Motion For Summary Judgment, filed May 13, 1991.) Thus, Action assumed the liability for the Creek County Litigation. Furthermore, Action is not entitled to indemnification from Lear. Paragraph 8.2 of the Agreement states in pertinent part that the Seller agrees to indemnify the buyer for any liability or expenses involving any injury to persons or property caused by seller occurring prior to the Closing Date. Id. The injury to Clifford Bear occurred after the closing date of the agreement. Thus, Lear is not required to indemnify Action for the liability and expenses resulting from the Creek County litigation.

The Court, therefore, sustains the Motion for Summary Judgment of the Defendant, Lear Siegler Holdings Corporation, and overrules the Motion for Summary Judgment of the Plaintiffs, Action Supply Safety Company and Maryland Casualty Company, in accordance with the above.

IT IS SO ORDERED, this 19th day of June, 1991.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 19 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

JAMES DEWAYNE KERR,

Petitioner,

vs.

R. MICHAEL CODY,

Respondent.

No. 89-C-969-C

ORDER

The Court has reviewed the pleading filed by the respondent on February 21, 1991 and is satisfied that the respondent has complied with the Court's Order of June 27, 1990.

The petition for habeas relief is rendered moot and the Court Clerk is directed to close the file.

IT IS SO ORDERED this 19th day of June, 1991.

H. DALE COOK
Chief Judge, U. S. District Court

14

44-34

FILED

JUN 19 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RUTH MYERS,

Plaintiff,

vs.

WAL-MART STORES, INC.,
A Delaware Corporation,

Defendant.

No: C 90-619-E

O R D E R
FOR
DISMISSAL WITH PREJUDICE

NOW ON this 19th day of June, 1991, the Plaintiff's Application for Dismissal With Prejudice comes on before me, the undersigned United States District Court Judge, and upon review of said Application this Court finds that this matter should be and is hereby dismissed with prejudice.

IT IS SO ORDERED.

S/ JAMES O. ELLISON

HONORABLE JAMES O. ELLISON,
United States District Court
Judge for the Northern District

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ANNABELLE WINTERS, d/b/a SHARP'S PAWN SHOP,

Plaintiff,

v.

BOARD OF COUNTY COMMISSIONERS OF OSAGE COUNTY, OKLAHOMA, et al,

Defendants.

90-C-508-C

FILED
JUN 19 1991
Jack C. Silver, Clerk
U.S. DISTRICT COURT

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed May 15, 1991, in which the Magistrate Judge recommended that defendants' Motion for Summary Judgment be granted as to all of plaintiff's claims, and plaintiff's Motion for Summary Judgment be denied as to all of her claims. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the court has concluded that the Report and Recommendation of the Magistrate Judge should be and hereby is affirmed.

It is therefore Ordered that defendants' Motion for Summary Judgment is granted as to all of plaintiff's claims, and plaintiff's Motion for Summary Judgment is denied as to all of her claims, for the reasons more fully set forth in the Report and Recommendation.

Dated this 18th day of June, 1991.

H. DALE COOK, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 19 1991
Jack C. Silver, Clerk
U.S. DISTRICT COURT

PHYLIS S. ENRIQUEZ,

Plaintiff,

v.

LOUIS W. SULLIVAN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

90-C-591-B

ORDER

The court has for consideration the Findings and Recommendations of the Magistrate Judge filed May 13, 1991, in which the Magistrate Judge recommended that this case be remanded to the Secretary for reconsideration. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the court has concluded that the Findings and Recommendations of the Magistrate should be and hereby are affirmed.

It is therefore Ordered that this case be remanded to the Secretary for reconsideration. Prior to such reconsideration, the records and progress notes from the Tulsa Psychiatric Center and Dr. Ingram should be obtained by the Secretary to supplement the record, and the supplemental record should be reviewed by an expert psychiatric consultant to obtain an opinion as to the onset of claimant's psychiatric problem.

Dated this 19th day of June, 1991.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 19 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

JAMES NAUM, Plaintiff,	}	
vs.	}	No. 85-C-320-C
JOHN BROWN, et al., Defendants.	}	

ORDER

By pleading dated May 17, 1991, defendants have advised the Court that plaintiff James Naum was discharged on March 27, 1991 from the custody of the Department of Corrections. Plaintiff's motions are therefore rendered moot. Accordingly the Court Clerk is directed to close the file.

IT IS SO ORDERED this 19th day of June, 1991.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity, Plaintiff, vs. J. F. STOABS & SONS, INC., an Oklahoma corporation, CHARLES J. NELSON, an individual, DONNA J. NELSON, an individual, JOHN J. FLORER, an individual, LODEMA P. FLORER, an individual, JACK STOABS, an individual, STAN STEVENS, Washington County Treasurer, WILMA BLUE, Osage County Treasurer, and the STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION Defendants.	)	Case No. 91-C-44-C

FILED
JUN 19 1991
Jack C. Silver, Clerk
U.S. DISTRICT COURT

AGREED JOURNAL ENTRY OF JUDGMENT

Now on this 18 day of June, 1991, comes on before me the above entitled cause, Plaintiff, Federal Deposit Insurance Corporation, in its corporate capacity, appears by and through its attorney of record, Bradley K. Beasley of Boesche, McDermott and Eskridge, Defendants J.F. Stoabs & Sons, Charles J. Nelson, Donna J. Nelson and John J. Florer appear by and through their attorney of record, Robert P. Kelly, Defendant Lodema P. Florer appears by and through her attorney of record, T.E. Drummond of Drummond, Raymond Hinds, DesBarres & Clausing, Defendant Jack Stoabs appears by and through his attorney of record, Randall Iola of Ungerman & Iola, Defendant Joyce Hathcoat, County Treasurer for Osage County, Oklahoma appears by and through her attorney of record, Larry D. Stuart, District Attorney for Osage County, Oklahoma, Defendant

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

Stan Stevens, County Treasurer for Washington County appears by and through his attorney of record, Craig D. Corgan, District Attorney for Washington County, Oklahoma and the other parties appearing not, and the Court being fully advised in the premises, after reviewing all of the evidence, and hearing arguments of counsel, finds as follows:

1. Plaintiff Federal Deposit Insurance Corporation, in its corporate capacity, ("FDIC") is an entity organized and existing under the laws of the United States of America.

2. Union Bank & Trust, Bartlesville, Oklahoma ("Union") was a national banking association and had its principal place of business in the City of Bartlesville, Washington County, State of Oklahoma.

3. Defendant J. F. Stoabs & Sons, Inc. (the "Company") is an Oklahoma corporation with its principal place of business in the City of Barnsdall, Osage County, Oklahoma.

4. Defendants Charles J. Nelson and Donna J. Nelson, (collectively "Nelsons") are individuals whose address is the City of Barnsdall, Osage County, Oklahoma.

5. Defendants John J. Florer, an individual, resided in, and Lodema P. Florer, an individual, is residing in (the "Florers") Osage County, Oklahoma.

6. Defendant Jack Stoabs ("Stoabs") is an individual residing in the City of Barnsdall, Osage County, Oklahoma, who was dismissed herein as a party Defendant by Stipulation of Dismissal filed in the subject action on April 1, 1991, however, such demissal applies only to the claim of FDIC against Defendant Stoabs

by virtue of his guaranty but did not apply to the claim of Defendant Stoabs in and to the real property involved herein by virtue of a certain mortgage dated March 5, 1984, in the original principal amount of $150,900.00, executed by J. F. Stoabs and Sons, Inc., in favor of Stoabs and recorded in the office of the County Clerk for Osage County, Oklahoma on July 5, 1984 in Book 658, Page 783, and recorded in the Office of the County Clerk for Washington County, Oklahoma on July 16, 1984 in Book 820, Page 513 (the "Stoabs Mortgage").

7. Defendant Stan Stevens is the County Treasurer for Washington County, State of Oklahoma (the "Washington County Treasurer") and claims some right, title and/or interest in and to the real property involved herein as a result of unpaid ad valorem taxes and unpaid personal property taxes.

8. Defendant Wilma Blue is the County Treasurer for Osage County, State of Oklahoma (the "Osage County Treasurer") and claims claim some right, title and/or interest in and to the real property involved herein as a result of unpaid ad valorem taxes and unpaid personal property taxes.

9. State of Oklahoma ex rel. Oklahoma Tax Commission ("State of Oklahoma") is a defendant herein by virtue of certain tax warrants and liens described as follows:

> Warrant No. STS88002762 against Joe Nelson, individually and as Secretary/Treasurer of J. F. Stoabs & Sons, Inc., recorded January 5, 1989, in the office of the County Clerk for Osage County, Oklahoma in Book 747, Page 405;
>
> Warrant No. STS88002762 against Johnny J. Florer, individually and as President of J. F. Stoabs & Sons, Inc., recorded January 5, 1989, in the office of the County Clerk for Osage County, Oklahoma in Book 747, Page 406;

Warrant No. STS88002762 against J. F. Stoabs & Sons, Inc., recorded January 5, 1989, in the office of the County Clerk for Osage County, Oklahoma in Book 747, Page 407;

and

Lien No. 2146 in the sum of $97,395.52 dated June 8, 1987
Lien No. 2173 in the sum of $265,313.37 dated August 31, 1987
Lien No. 2293 in the sum of $83,324.57 dated October 6, 1988
Lien No. 2325 in the sum of $2,452.54 dated January 30, 1989
Lien No. 2331 in the sum of $13,980.99 dated February 21, 1989;

however, State of Oklahoma filed a Disclaimer of all right, title and interest in and to the real property which is the subject of this action, and hence, claims no further interest therein.

10. The events giving rise to this action all occurred in Washington County, State of Oklahoma.

11. The real properties which are the subject of this action are located in Washington County and Osage County, Oklahoma.

12. Subject matter and personal jurisdiction are proper in this Court and venue is availing.

13. On August 11, 1983, for good and valuable consideration, the Company made, executed and delivered to Union that promissory note bearing note number 63307 in the original principal sum of Six Hundred Forty Six Thousand Six Hundred Seventy-Five and 00/100 Dollars ($646,675.00) plus interest accruing thereon (the "A-Note").

14. On March 19, 1984, in replacement of the A-Note, for good and valuable consideration, the Company made, executed and delivered to Union that promissory note bearing note number 65480 in the original principal sum of Six Hundred Twenty Three Thousand Four Hundred Forty-Five and 06/100 Dollars ($623,445.06) plus

interest accruing thereon with an original maturity date of September 11, 1986 ("Note A-1"). A copy of Note A-1 is attached to the Complaint, marked Exhibit "A" and incorporated herein by reference.

15. As security for repayment of the indebtedness originally evidenced by the A-Note as replaced by Note A-1, the Company made, executed and delivered to Union that certain real estate mortgage dated August 11, 1983, recorded in the office of the County Clerk for Washington County, Oklahoma on August 12, 1983 in Book 803, page 69 and re-recorded in the office of the County Clerk for Washington County, Oklahoma on August 18, 1983 in Book 803, Page 333 (the "A-Mortgage"), covering the following described real property, all of which is located in Washington County, State of Oklahoma, to wit:

> Lot One (1), WILLOWHILL Section I Addition, Bartlesville, Washington County, Oklahoma, also a tract in the Northwest Quarter (NW¼) of Section Fifteen (15) Township Twenty-Six (26) North, Range Thirteen (13) East more particularly described as follows: Beginning at a point that is 60 feet east and 350 feet south of the Northwest Corner of said Section; thence East parallel with the North Section Line for a distance of 250 feet; thence south parallel with the west section line for a distance of 250 feet; thence west parallel with the north section line for a distance of 250 feet to a point that is 60 feet east of the west section line; thence north parallel with the west section line for a distance of 250 feet to the point of beginning

together with all buildings, fixtures, equipment, machinery and improvements located thereon (the "A-Property"). A copy of the A-Mortgage is attached to the Complaint, marked Exhibit "B" and incorporated herein by reference.

16. On August 11, 1983, for good and valuable consideration, the Company made, executed and delivered to Union that promissory

note bearing note number 63308 in the original principal sum of Three Hundred Thirty Three Thousand Five Hundred and 00/100 Dollars ($333,500.00) plus interest accruing thereon (the "B-Note").

17. On March 19, 1984, in replacement of the B-Note, for good and valuable consideration, the Company made, executed and delivered to Union that promissory note bearing note number 65481 in the original principal sum of Three Hundred Twenty Two Thousand Six Hundred Fifty Seven and 99/100 Dollars ($322,657.99) plus interest accruing thereon with an original maturity date of September 11, 1986 (the "B-1 Note"). A copy of the B-1 Note is attached to the Complaint, marked Exhibit "C" and incorporated herein by reference.

18. As security for repayment of the indebtedness originally evidenced by the B-Note, as replaced by the B-1 Note, the Company made, executed and delivered to Union that certain real estate mortgage dated August 11, 1983, recorded in the office of the County Clerk for Osage County, Oklahoma on August 15, 1983 in Book 640, page 541 (the "B-Mortgage"), covering the following described real property, all of which is located in Osage County, State of Oklahoma, to wit:

> Lots 13, 14, 15 and 16, Block 6, PETTIT ADDITION to Hominy, Osage County, Oklahoma

together with all buildings, fixtures, equipment and machinery, and improvements located thereon (the "B-Property").

The A-Property and B-Property are hereinafter collectively referred to as the "Properties". A copy of the B-Mortgage is attached to the Complaint, marked Exhibit "D" and incorporated herein by

reference. The A-Mortgage and B-Mortgage are hereinafter collectively referred to as the "Mortgages".

19. On March 19, 1984, the Nelsons made, executed and delivered unto Union their Guaranty Agreement (the "Nelson Guaranty") wherein they unconditionally guaranteed repayment of all indebtedness at any time due and owing by the Company to Union. A copy of the Nelson Guaranty is attached to the Complaint, marked Exhibit "E" and incorporated herein by reference.

20. On March 19, 1984, the Florers made, executed and delivered unto Union their Guaranty Agreement (the "Florer Guaranty") wherein they unconditionally guaranteed repayment of all indebtedness at any time due and owing by the Company to Union. A copy of the Florer Guaranty is attached to the Complaint, marked Exhibit "F" and incorporated herein by reference.

21. On September 22, 1986, the Company executed Deferral Agreements covering the Notes pursuant to which the maturity dates for the Notes were extended to September 11, 1989 and the annual percentage rate was reduced to 10.00%. Copies of the Deferral Agreements are attached to the Complaint, marked Exhibits "H" and "I" respectively and incorporated herein by reference.

22. On October 8, 1987, the Oklahoma State Banking Commissioner ("Commissioner") issued Order No. 88-R-27 closing Union and assumed exclusive custody and control of the property and affairs of Union pursuant to Okla. Stat. tit. 6 §1202(B) (1984).

23. Thereafter, the Commissioner tendered to Federal Deposit Insurance Corporation appointment as the Liquidating Agent (the "Liquidating Agent") of Union pursuant to Okla. Stat. tit. 6

§1205(B)(1984) which FDIC accepted pursuant to 12 U.S.C. §1821(e), and therefore became possessed of all assets, business and property of Union pursuant to Okla. Stat. tit. 6 §1205(C)(1984)

24. Subsequently, certain assets of Union were sold and transferred from FDIC as the Liquidating Agent to FDIC in its corporate capacity pursuant to Okla. Stat. tit. 6, §1204(A). FDIC, in its corporate capacity, pursuant to 12 U.S.C. §1823(c)(2)(A), purchased those certain assets involved in this lawsuit and is the lawful holder and owner of same.

25. Although written notice and demand has been given, the Company has failed and refused, and continues to fail and refuse to make the payments required under terms of the Notes and as a result, is in default thereunder. In addition, the Notes both matured on September 11, 1989 without payment of the balance due thereunder which also constitutes an event of default under the terms of the Notes and the Mortgages.

26. As of May 3, 1991, there was due, owing and unpaid under the terms of Note A-1 the principal sum of $383,691.32 plus accrued interest in the sum of $94,396.52 plus interest accruing from and after May 3, 1991 until paid in full at the rate of $105.12 per diem.

27. As of May 3, 1991, there was due, owing and unpaid under the terms of Note B-1 the principal sum of $205,558.34 plus accrued interest in the sum of $47,306.47, plus interest accruing from and after May 3, 1991 until paid in full at the rate of $56.32 per diem.

28. Under the terms of the Notes, the Company is liable to FDIC for all costs and expenses incurred in collecting the indebtedness evidenced by the Notes together with a reasonable attorney's fee not to exceed fifteen per cent (15%) of the unpaid sums due under the Notes.

29. The A-Mortgage is a first, valid, prior and superior lien against the A-Property and FDIC is entitled to have the A-Mortgage foreclosed, subject only to the claim of the Washington County Treasurer for unpaid ad valorem taxes due and owing.

30. The B-Mortgage is a first, valid, prior and superior lien against the B-Property and FDIC is entitled to have the B-Mortgage foreclosed, subject only to the claim of the Osage County Treasurer for unpaid ad valorem taxes due and owing.

31. Defendants the Company, the Nelsons, the Florers and Stoabs, each claim or may claim some right, title and/or interest in and to one or both of the Properties, but the interest of each is junior, subordinate and inferior to the right, title and interest of FDIC. Defendants the Washington County Treasurer and the Osage County Treasurer claim some right, title and/or interest in and to the A-Property and the B-Property, respectively for unpaid personal property taxes, but the interest of each is junior, subordinate and inferior to the right, title and interest of FDIC.

32. FDIC is entitled to judgment in personam against Defendant the Company for all sums due and owing under the terms of the Notes, together with all costs and expenses incurred herein, a reasonable attorney's fee not to exceed 15% of the foregoing sums,

plus interest accruing on the total from and after date of judgment until paid in full at the maximum rate allowed by law.

33. FDIC is entitled to judgment in personam against Defendants the Nelsons pursuant to the Nelson Guaranty for all sums due and owing under the terms of the Notes including all costs and expenses incurred herein, a reasonable attorney's fee not to exceed 15% of the foregoing sums, plus interest on the total from and after date of judgment until paid in full at the maximum rate allowed by law.

34. FDIC is entitled to judgment in personam against Defendants the Florers pursuant to the Florer Guaranty for all sums due and owing under the terms of the Notes including all costs and expenses incurred herein, a reasonable attorney's fee not to exceed 15% of the foregoing sums, plus interest on the total from and after date of judgment until paid in full at the maximum rate allowed by law.

35. FDIC is entitled to judgment in rem against Defendants the Company, the Nelsons, the Florers, Stoabs, the State of Oklahoma, the Washington County Treasurer and the Osage County Treasurer as to the Properties, save and except the claims for unpaid ad valorem taxes.

36. FDIC also is entitled to foreclose the A-Mortgage and to have the A-Property sold at Sheriff's Sale with appraisement, free and clear of all right, title and interest of Defendants, with the proceeds realized therefrom applied first to the costs of sale, next to the unpaid ad valorem taxes due and owing the Washington County Treasurer, next to the judgment rendered herein in favor of

FDIC on Note A-1, with any sums remaining thereafter being applied pursuant to further order of this Court.

37. FDIC also is entitled to foreclose the B-Mortgage and to have the B-Property sold at Sheriff's Sale with appraisement, free and clear of all right, title and interest of Defendants, with the proceeds realized therefrom applied first to the costs of sale, next to the unpaid ad valorem taxes due and owing the Osage County Treasurer, next to the judgment rendered herein in favor of FDIC on Note B-1, with any sums remaining thereafter being applied pursuant to further order of this Court.

IT THEREFORE IS ORDERED, ADJUDGED AND DECREED THAT Judgment should be and is hereby rendered in favor of FDIC and against Defendants Company, the Nelsons and the Florers, jointly and severally, on Note A-1 for the principal sum of $383,691.32 plus accrued interest in the sum of $94,396.52 plus interest accruing from and after May 3, 1991 until date of entry of this Judgment at the rate of $105.12 per diem, all costs and expenses incurred herein, a reasonable attorney's fee not to exceed 15% of the foregoing sums, plus interest on the total from date of Judgment until paid in full at the maximum rate allowed by law.

IT FURTHER IS ORDERED, ADJUDGED AND DECREED THAT Judgment should be and is hereby rendered in favor of FDIC and against Defendants Company, the Nelsons and the Florers, jointly and severally, on Note B-1 for the principal sum of $205,558.34 plus accrued interest in the sum of $47,306.47, plus interest accruing from and after May 3, 1991 until date of entry of this Judgment at the rate of $56.32 per diem, all costs and expenses incurred

herein, a reasonable attorney's fee not to exceed 15% of the foregoing sums, plus interest on the total from date of Judgment until paid in full at the maximum rate allowed by law.

IT FURTHER IS ORDERED, ADJUDGED AND DECREED THAT the A-Mortgage and the B-Mortgage are first, valid, prior and superior liens against the A-Property and the B-Property, respectively, and that the right, title and/or interest of each of the Defendants in and to the Properties is junior, subordinate and inferior to the Mortgages, except the interests of the Washington County Treasurer and the Osage County Treasurer, respectively, for unpaid ad valorem taxes.

IT FURTHER IS ORDERED, ADJUDGED AND DECREED THAT the Mortgages should be and are hereby foreclosed and the Properties shall be sold at Sheriff's Sale with appraisement subject to any outstanding, unpaid ad valorem taxes, with the proceeds realized therefrom being applied first to the costs of the Sheriff's Sale, next to the respective judgments rendered herein in favor of FDIC, with any sums remaining thereafter being applied pursuant to further order of the Court.

IT FURTHER IS ORDERED, ADJUDGED AND DECREED THAT, following the sale of the Properties, each Defendant shall be forever barred, foreclosed and enjoined from asserting any right, title and/or interest in and to the Properties.

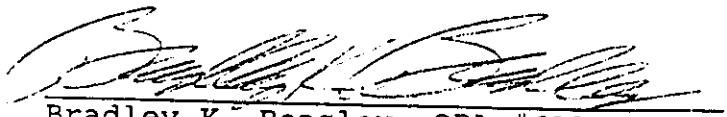
FOR ALL THE FOREGOING, LET EXECUTION ISSUE.

(Signed) H. Dale Cook

H. DALE COOKE, CHIEF JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

APPROVED AS TO FORM AND CONTENT:



Bradley K. Beasley, OBA #628
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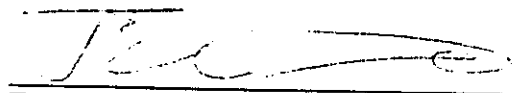
ATTORNEY FOR DEFENDANT JOYCE HATHCOAT,
County Treasurer for Osage County, Oklahoma



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ATTORNEY FOR DEFENDANT
JACK STOABS

BKB-mfd#2a\Stoabs\Journal Entry.Jud

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 19 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

BRIAN EARL MURPHY,

Plaintiff,

vs.

RON CHAMPION, et al.,

Defendants.

No. 91-C-18-E

O R D E R

This matter is before the Court on Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) Fed.R.Civ.P. Applying the lenient standard appropriate to the scrutiny of prisoner's pro se complaint, viewing the material allegations of the complaint in their most favorable light, it appears to the Court that the Plaintiff has not presented a set of facts in support of his various claims which would entitle him to relief. See, Akao v. Shimode, 832 F.2d 119 (9th Cir. 1987), cert. denied, 485 U.S. 993, 108 S.Ct. 1301, 99 L.Ed.2d 511. The Court finds, therefore, that this matter should be dismissed.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss is granted; this matter is dismissed without prejudice.

ORDERED this 19th day of June, 1991.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

entered

FILED

JUN 19 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LYMAN LEROY BRADSHAW,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. 88-CR-88-C
No. 91-C-002-C

ORDER

Currently pending before the Court is the second motion filed by petitioner, Lyman Bradshaw, seeking relief under 28 U.S.C §2255.

On September 30, 1988 Bradshaw pleaded guilty to a one count information charging him with violation of 21 U.S.C §841 (a)(1), possession with intent to distribute methamphetamine, a schedule II controlled substance. Bradshaw moves the Court to vacate his plea of guilty and dismiss the information on the following grounds: (1) methamphetamine has been improperly classified as a schedule II controlled substance, (2) the procedure used for classifying a drug as a schedule II controlled substance is invalid, (3) the delegation of authority from Congress to the Attorney General to classify any drug or substance is a violation of the separation of powers doctrine and thus unconstitutional, and (4) ineffective assistance of counsel.

Bradshaw's contention that methamphetamine has been improperly classified as a schedule II controlled substance has been

considered and rejected in United States v. Roark, 90-1334, slip. op. (8th Cir. Jan. 30, 1991).

Bradshaw's contention that Congress has unconstitutionally delegated its lawmaking authority has been rejected by numerous counts. See, e.g. United States v. Daniel, 813 F.2d 661 (5th Cir. 1987), United States v. Pastor, 557 F.2d 930 (2nd Cir. 1977), and United States v. Davis, 564 F.2d 840 (9th Cir. 1977), cert. den. 434 U.S. 1015.

Bradshaw has failed to allege any factual bases for his contention of ineffective assistance of counsel. Bradshaw has made no showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland v. Washington, 466 U.S. 668, 695 (1984). The matters raised by Bradshaw in his motion which he asserts should have been raised by his counsel at the time of trial have been previously raised and rejected by numerous circuit courts.

Accordingly, the Court hereby denies Bradshaw's motion for relief under 28 U.S.C. §2255.

IT IS SO ORDERED this 19th day of June, 1991.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 19 1991
Jack C. Silver, Clerk
U.S. DISTRICT COURT

BILLY W. CASEY,

Plaintiff,

v.

LOUIS W. SULLIVAN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

Case No. 87-C-81-B

ORDER

The court has for consideration the Findings and Recommendations of the Magistrate Judge filed May 30, 1991, in which the Magistrate Judge recommended that this case be remanded to the Secretary for re-hearing. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the court has concluded that the Findings and Recommendations of the Magistrate should be and hereby are affirmed.

It is therefore Ordered that this case is remanded to the Secretary and that subpoenas be issued to allow claimant to cross-examine Dr. Passmore and Dr. Smith, whose reports were material evidence considered by the Administrative Law Judge ("ALJ") in determining that claimant was not disabled, with a re-hearing before the ALJ to follow.

Dated this 19th day of June, 1991.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

entered

FILED

JUN 19 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

THEDORE W. FORD,

Petitioner,

vs.

JACK COWLEY, et al.,

Defendants.

No. 88-C-631-C

ORDER

Before the Court is the objection filed by the petitioner, Thedore Ford, to the Report and Recommendation of Magistrate Judge John Wagner. Petitioner appeals from a recommendation denying petitioner's request for an evidentiary hearing.

On March 22, 1990, this Court stayed petitioner's application for habeas relief in order to allow defendants an opportunity to provide petitioner with a court-appointed attorney and a direct appeal in his state court action. The Court has been advised that an attorney has been appointed and an appeal has been filed. There is no legal basis for providing petitioner an evidentiary hearing at this time.

Accordingly, the Magistrate Judge's recommendation is affirmed and adopted by the Court.

IT IS SO ORDERED this 19th day of June, 1991.

H. DALE COOK
Chief Judge, U. S. District Court

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHELLE McCORMICK AND ANTHONY McCORMICK, Plaintiffs, vs. NEWELL COMPANY, a Delaware corporation, d/b/a ANCHOR HOCKING, a wholly owned subsidiary and Delaware corporation, d/b/a MIRRO/ FOLEY, a wholly owned subsidiary, Defendants.	)	No. 90-C-306-C

FILED
JUN 19 1991
Jack C. Silver, Clerk
U.S. DISTRICT COURT

ORDER DISMISSING DEFENDANT
ANCHOR HOCKING D/B/A MIRRO/FOLEY
WITH PREJUDICE

NOW ON this 18th day of June, 1991, this matter coming before the Court upon joint application of the Plaintiffs, Michelle McCormick and Anthony McCormick and the Defendant, Anchor Hocking d/b/a Mirro/Foley, for Order dismissing Defendant Anchor Hocking d/b/a Mirro/Foley from the above named action, and upon the Court's review of the said application,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant Anchor Hocking d/b/a Mirro/Foley be and hereby is dismissed from the above named action as a Defendant with prejudice.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TERRY J. PENN,)
)
Petitioner,)
)
v.) 90-C-657-C
)
RON CHAMPION, et al,)
)
Respondents.)

FILED
JUN 19 1991
Jack C. Silver, Clerk
U.S. DISTRICT COURT

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed May 21, 1991, in which the Magistrate Judge recommended that petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be denied. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the court has concluded that the Report and Recommendation of the Magistrate Judge should be and hereby is affirmed.

It is therefore Ordered that petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is denied.

Dated this 19th day of June, 1991.

H. DALE COOK, CHIEF
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDA K. CARTER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 90-C-624-C
	)	
LELAND EUGENE SCHMITT,	)	
	)	
Defendant.	)	

FILED
JUN 19 1991
Jack C. Silver, Clerk
U.S. DISTRICT COURT

ORDER

IT IS HEREBY ORDERED that Plaintiff's Application to Dismiss With Prejudice is granted and the above-captioned cause of action is dismissed with prejudice.

DATED this 18 day of June, 1991.

(Signed) H. Dale Cook

H. DALE COOK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 19 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

SHARON M. GLASS and JAMES W. GLASS, Plaintiffs,	)	
vs.	)	No. 90-C 892 B
EARNEST CHARLES GARDNER and STILES TRUCK LINES, INC., Defendants.	)	

ORDER OF DISMISSAL WITH PREJUDICE

NOW on this 19th day of June, 1991, the Joint Stipulation for Dismissal With Prejudice comes on for consideration, and for good cause shown:

IT IS HEREBY ORDERED that the above-styled and numbered action and all claims of the Plaintiffs, and each of them, are hereby dismissed with prejudice against the Defendants, and each of them, with each party bearing their own costs, attorney fees, and expenses.

S/ THOMAS R. BRETT

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 19 1991
Jack C. Silver, Clerk
U.S. DISTRICT COURT

CLARA GRIMMETT,

Plaintiff,

vs.

LOUIS W. SULLIVAN, M.D., Secretary of Health and Human Services,

Defendant.

No. 88-C-48-C

ORDER

Before the Court is the motion of the plaintiff, Clara Grimmett, for attorney fees as prevailing party on her complaint seeking judicial review of a final decision of Secretary of Health and Human Services pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. §§405(g) and 1383(c)(3). Plaintiff requests attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412(b) and (d), as amended by Pub.L.No. 99-80.

Plaintiff seeks compensation for 35.15 hours at $100.00 per hour. Plaintiff also seeks court costs in the sum of $28.50.

Under the EAJA, the Court may award,

> reasonable attorney fees ... based upon prevailing market rates for the kind and quality of services furnished except that ... attorney fees shall not be awarded in excess of $75.00 per hour unless the Court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.
>
> 28 U.S.C. §2412(d)(2)(A).

The court may also find there was bad faith on the part of the government in considering the amount of fee to be awarded. 28 U.S.C. §2412(b).

Plaintiff seeks a cost of living enhancement of $25.00 per hour and a judicial finding that government acted in bad faith.

In response, the government requests that defendant be awarded fees based on a rate of $94.35 per hour which government derives from a consumer price index chart tendered by the plaintiff. Government also denies that it has acted in bad faith.

The Court has reviewed the record and finds that there is no indication government has acted in bad faith. Accordingly, plaintiff's motion for attorney fees as prevailing party is hereby granted. Plaintiff is awarded fees for 35.15 hours of work at a rate of $94.35 per hour, or $3,316.40, plus costs in the sum of $28.50.

IT IS SO ORDERED this 19th day of June, 1991.

H. DALE COOK
Chief Judge, U. S. District Court

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREGORY E. PERRYMAN;
LINDA CAROLE PERRYMAN;
GISH & ASSOCIATES, INC.;
GENERAL MOTORS ACCEPTANCE
CORPORATION; COUNTY TREASURER,
Tulsa County, Oklahoma; and
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

FILED

JUN 18 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 90-C-963-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 18th day of June, 1991. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, Gish & Associates, Inc., appears not, having previously filed a Disclaimer; the Defendant, General Motors Acceptance Corporation, appears by its attorney Brian J. Rayment; and the Defendants, Gregory E. Perryman and Linda Carole Perryman, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, Gregory E. Perryman and

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Linda Carole Perryman, were served with Summons and Complaint on March 19, 1991; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on November 14, 1990; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on November 14, 1990.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on November 30, 1990; that the Defendant, Gish & Associates, Inc., filed its Disclaimer on November 15, 1990; that the Defendant, General Motors Acceptance Corporation, filed its Answer on December 7, 1990; and that the Defendants, Gregory E. Perryman and Linda Carole Perryman, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Five (5), Block One (1), GREEN ACRES OF GLENPOOL, an Addition in the City of Glenpool, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on October 20, 1983, the Defendants, Gregory E. Perryman and Linda Carole Perryman, executed and delivered to the United States of America, acting through the Farmers Home Administration, their promissory note in

the amount of $39,500.00, payable in monthly installments, with interest thereon at the rate of 10.75 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Gregory E. Perryman and Linda Carole Perryman, executed and delivered to the United States of America, acting through the Farmers Home Administration, a mortgage dated October 20, 1983, covering the above-described property. Said mortgage was recorded on October 20, 1983, in Book 4737, Page 6, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 7, 1984, Gregory E. Perryman and Linda Carole Perryman executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on November 15, 1984, Gregory Eugene Perryman and Linda Carole Perryman executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on April 22, 1985, Gregory E. Perryman and Linda Carole Perryman executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement

pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on February 11, 1986, Greg E. Perryman and Carole Perryman executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that on January 22, 1987, Greg E. Perryman and Linda Carole Perryman executed and delivered to the United States of America, acting through the Farmers Home Administration, an Interest Credit Agreement pursuant to which the interest rate on the above-described note and mortgage was reduced.

The Court further finds that the Defendants, Gregory E. Perryman and Linda Carole Perryman, made default under the terms of the aforesaid note, mortgage and interest credit agreements by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Gregory E. Perryman and Linda Carole Perryman, are indebted to the Plaintiff in the principal sum of $40,887.64, plus accrued interest in the amount of $5,694.75 as of February 14, 1990, plus interest accruing thereafter at the rate of 10.75 percent per annum or $12.0423 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the further sum due and owing under the interest credit agreements of $13,119.91, plus interest on that sum at the legal

rate from judgment until paid, and the costs of this action in the amount of $33.20 ($20.00 docket fees, $13.20 fees for service of Summons and Complaint).

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $512.00, plus penalties and interest, for the year 1990. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, General Motors Acceptance Corporation, has a lien on the property which is the subject matter of this action by virtue of a Journal Entry of Judgment entered in the District Court of Tulsa County, State of Oklahoma, Case No. CS 89-1456, in the amount of $2,468.20, with interest at the statutory rate per annum from the date of judgment, an attorney's fee of $370.00, and the costs of the action. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, Gish & Associates, Inc., disclaims all right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, Gregory E. Perryman and Linda Carole Perryman, in the principal

sum of $40,887.64, plus accrued interest in the amount of $5,694.75 as of February 14, 1990, plus interest accruing thereafter at the rate of 10.75 percent per annum or $12.0423 per day until judgment, plus interest thereafter at the current legal rate of 6.09 percent per annum until fully paid, and the further sum due and owing under the interest credit agreements of $13,119.91, plus interest on that sum at the current legal rate of 6.09 percent per annum from judgment until paid, plus the costs of this action in the amount of $33.20 ($20.00 docket fees, $13.20 fees for service of Summons and Complaint), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of $512.00, plus penalties and interest, for ad valorem taxes for the year 1990, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, General Motors Acceptance Corporation, have and recover judgment in the amount of $2,468.20, with interest at the statutory rate per annum from the date of judgment, an attorney's fee of $370.00, and the costs of the action by virtue of a Journal Entry of Judgment entered in the District Court of Tulsa County, State of Oklahoma, Case No. CS 89-1456.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Gish & Associates, Inc. and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Gregory E. Perryman and Linda Carole Perryman, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property involved herein and apply the proceeds of the sale as follows:

> **First:**
> In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;
>
> **Second:**
> In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of $512.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;
>
> **Third:**
> In payment of the judgment rendered herein in favor of the Plaintiff;
>
> **Fourth:**
> In payment of the judgment rendered herein in favor of the Defendant, General Motors Acceptance Corporation.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants

and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

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Judgment of Foreclosure
Civil Action No. 90-C-963-E

PB/css

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 18 1991
Jack C. Silver, Clerk
U.S. DISTRICT COURT

KARL WAYNE TIGER,

Petitioner,

v.

DAN REYNOLDS and THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,

Respondents.

91-C-217-B

ORDER

This order pertains to Petitioner's Application for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Docket #1-2)[1] and Respondents' Response to Petition for Writ of Habeas Corpus (Docket #3). Petitioner was convicted in Tulsa County District Court, in Case Nos. CRF-80-3288 and CRF-81-877, of second degree murder after former conviction of a felony, escape from a penal institution after former conviction of a felony, and assault with a dangerous weapon after former conviction of a felony, and sentenced to fifty years, two years, and thirty years imprisonment. Petitioner now seeks federal habeas corpus relief on the alleged ground that the Department of Corrections records do not reflect the rulings made by the District Court of Tulsa County granting post-conviction relief and reducing his sentences in the two cases.

Respondents allege that the Attorney General of the State of Oklahoma should be dismissed because he is not a proper party respondent pursuant to Rule 2(a) of the Rules

[1] "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

Governing Section 2254 Cases.[2]

Under Rule 2(a) of the Rules Governing Section 2254 Cases, the state officer having custody of the applicant should be named as respondent. When a habeas corpus petitioner seeks relief from state custody, he must direct his petition against those state officials holding him in restraint. Moore v. United States, 339 F.2d 448 (10th Cir. 1964). However, petitioner's pro se pleadings will be held to a less stringent standard than formal pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520 (1972).

In Spradling v. Maynard, 527 F.Supp. 398, 404 (1981), the court held that the Attorney General of the State of Oklahoma is not a proper party respondent in a habeas corpus action brought by a state prisoner already in custody.[3] The court stated:

> The Attorney General of Oklahoma is simply legal counsel for the Oklahoma Department of Corrections and its employees. He is not the custodian of any prisoner incarcerated in any Oklahoma correctional institution. In the circumstances, he could not respond to a writ of habeas corpus on behalf of a prisoner even if one was issued to him.

Id.

The court is aware that the model form for use by petitioners making § 2254 habeas corpus applications includes the state attorney general as an additional respondent. Practically speaking, the Attorney General of Oklahoma, as legal counsel for the Oklahoma

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[2] Rule 2(a), regarding applicants in present custody, reads as follows: If the applicant is presently in custody pursuant to the state judgment in question, the application shall be in the form of a petition for a writ of habeas corpus in which the state officer having custody of the applicant shall be named as respondent.

[3] The Magistrate notes that Rule 2(b) of the Rules Governing Section 2254 Cases in the United States District Courts pertaining to applicants subject to future custody requires the joinder of the state Attorney General: "If the applicant is not presently in custody pursuant to the state judgment against which he seeks relief but may be subject to such custody in the future, the application shall be in the form of a petition for a writ of habeas corpus with an added prayer for appropriate relief against the judgment which he seeks to attack. In such a case the officer having present custody of the applicant and the attorney general of the state in which the judgment which he seeks to attack was entered shall each be named as respondents."

Department of Corrections and its employees, benefits by receiving immediate notice of a habeas corpus action filed when named as an additional respondent. However, the court concludes that the Respondents' request for dismissal of the Attorney General of the State of Oklahoma as a party respondent should be granted pursuant to Rule 2(a).

Petitioner argues that the Department of Corrections does not have knowledge of the modification of his judgments and sentences entered by the district court and affirmed by the Court of Criminal Appeals. A state prisoner is entitled to habeas corpus relief only if he is held in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254. If a prisoner alleges no deprivation of federal rights, the federal habeas corpus statute is inapplicable. Engle v. Issac, 456 U.S. 107 (1982).

Matters concerning sentencing traditionally involve only an issue of state law and are not reviewable in a federal habeas corpus action. Hill v. Page, 454 F.2d 679, 680 (10th Cir. 1971); Handley v. Page, 279 F.Supp. 878, 879 (W.D. Okla.), aff'd, 398 F.2d 351 (10th Cir. 1968), cert. den. 394 U.S. 935 (1969). The Petitioner has not made a substantial showing of the denial of a federal right as required for the review of a habeas corpus petition and has merely set forth an alleged error of state law. Furthermore, any error asserted is merely error in the internal policy of the Oklahoma Department of Corrections.

Moreover, Respondent has agreed that Petitioner has a right to have the Department of Corrections records reflect the modification of his judgments and sentences and has contacted the Oklahoma State Penitentiary and transmitted the documents reflecting the change to it. The records manager has made the appropriate corrections to the Petitioner's

records (See Exhibit "B" attached to Respondent's Response). The court notes that Petitioner was not harmed by the Department's failure to earlier receive the modification, as these sentences were to be served concurrently with a fifty year sentence for second degree murder, which was not modified.

Petitioner has failed to raise any issue which should be addressed by this court. Petitioner's Application for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Docket #1-2) is denied.

Dated this 18 day of June, 1991.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED
JUN 18 1991
Jack C. Silver, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IN RE:	
FITZGERALD, DeARMAN & ROBERTS, INC.,	(Appeal from Bankruptcy Case No. 88-01859-W SIPA)
Debtor.	
P. DAVID NEWSOME, JR., Trustee for the Liquidation of Fitzgerald, DeArman & Roberts, Inc.,	Adversary No. 90-0174-W
Plaintiff,	
vs.	Case No. 91-C-207-B
GRAHAM INVESTMENTS, INC.,	
Defendant.	

ORDER

This order pertains to Plaintiff's Amended Motion to Dismiss Appeal, or, in the Alternative, Answer to Motion for Leave to Appeal (Docket #3)[1], Defendant's Response to Plaintiff's Motion and Amended Motion to Dismiss Appeal, or, in the Alternative, Answer to Motion for Leave to Appeal (Docket #4), Plaintiff's Reply to Defendant's Response to Plaintiff's Motion and Amended Motion to Dismiss Appeal (Docket #5), and Defendant's Response to Plaintiff's Reply to Defendant's Response to Plaintiff's Motion and Amended Motion to Dismiss Appeal (Docket #8).

Defendant appeals to this court from the final judgment of the Bankruptcy Court

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entered in this case on Thursday, March 21, 1991, which denied Defendant's Motion to Dismiss and Motion to Transfer. On Monday, April 1, 1991, Defendant filed its Notice of Appeal. Plaintiff submits that the Notice of Appeal is untimely, having been filed eleven (11) days after entry of the court's order. Defendant alleges that Bankruptcy Rule 9006, which is almost identical to Rule 6 of the Federal Rules of Civil Procedure, governs the computation of time in this case, and according to that Rule the day of the act from which the period of time begins to run is not included and the last day of the period is included unless it is a Saturday or Sunday. Under Rule 6, when the period of time prescribed is less than eleven days, Saturdays and Sundays are excluded from the computation, but Bankruptcy rule 9006 shortens that period to eight days. Thus Defendant claims its Notice of Appeal was timely filed.

The court finds that Defendant's Notice of Appeal was timely filed under Bankruptcy Rule 8002,[2] as it was file-stamped by the Bankruptcy Court on April 1, 1991, eleven days after the date of entry of the order appealed from, which was entered on March 21, 1991, but the tenth day was a Sunday. Under Bankruptcy Rule 9006,[3] the Sunday should be

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[2] Bankruptcy Rule 8002 states in part:

> The notice of appeal shall be filed with the clerk of the bankruptcy court within 10 days of the date of the entry of the judgment, order, or decree appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires. If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of that court or the clerk of the appellate panel shall note thereon the date on which it was received and transmit it to the clerk of the bankruptcy court and it shall be deemed filed in the bankruptcy court on the date so noted.

[3] Bankruptcy Rule 9006 states in part:

> (a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the clerk's office inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 8 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. . . .

excluded in the computation.

Plaintiff also claims that the orders appealed from are not final orders subject to appeal under Bankruptcy Rule 8001(a), but are interlocutory orders which may only be appealed by leave of court when a controlling question of law is involved and an intermediate appeal would materially advance the ultimate termination of the litigation. Plaintiff alleges that no such question of law is involved and this appeal would not advance the termination of the litigation.

The orders denying Defendant's Motion to Dismiss and Motion to Transfer were interlocutory orders. Catlin v. United States, 324 U.S. 229, 236 (1945); City of Morgantown v. Royal Insurance Co., Ltd., 337 U.S. 254, 256 (1949). Authority for the district court to hear appeals from interlocutory orders is found at 28 U.S.C. § 158, which provides in pertinent part:

> (a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving; and,
>
> (b) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

Section 158 is silent as to what standard or considerations should be employed by the district court in determining whether leave to appeal should be granted.

Because bankruptcy appeals are to be taken in the same manner as appeals in civil matters, generally the courts find the statutory provision governing interlocutory appeals

from district courts to appellate courts should be applied. 28 U.S.C. § 1292(b). See, In re Johns-Manville Corp., 47 B.R. 957 (S.D.N.Y. 1985). In general, exceptional circumstances must be present to warrant allowing an interlocutory appeal. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1977). 28 U.S.C. § 1292(b) mandates three conditions requisite to an interlocutory appeal: (1) the existence of a controlling question of law; which (2) would entail substantial ground for differences of opinion; and (3) the resolution of which would materially advance the ultimate termination of the litigation.

The court finds that there is no controlling question of law involved here which entails substantial ground for differences of opinion, the resolution of which would materially advance the termination of this case. Defendant's Motion to Dismiss Second Amended Complaint based on Bankruptcy Rule 7015[4] was denied when the Bankruptcy Court found that Plaintiff had met the requirement of showing a close identity of interest between parties for amendment of the pleadings under Federal Rule of Civil Procedure 15(c). The requirement had to be met before an amendment changing the name of a party could relate back to the date of filing of the original complaint, based on the Tenth Circuit Court of Appeals' decision and discussion of Rule 15(c) in Travelers Indemnity Co. v.

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[4] Bankruptcy Rule 7015(c) and Federal Rule of Civil Procedure 15(c) mirror each other and state:

> (c) Relation Bank of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.
>
> The delivery or mailing of process to the United States Attorney, or the United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

United States ex rel. Construction Specialties Co., 382 F.2d 103, 106 (10th Cir. 1967). The Supreme Court noted in Schiavone v. Fortune, 477 U.S. 21, 28-29 (1986), that the Courts of Appeal have split over the "identity of interest" exception allowing an amendment substituting a party to relate back to the original complaint's filing date, but found that the facts of the case did not fall within the exception. The Supreme Court noted that Rule 15(c) is central to a determination of the issue of relation back and found that the requirements of the Rule had not been met. This decision did not, as Defendant claims, "limit the scope" of the Travelers Indemnity Co. decision. The court does not find merit to Defendant's argument that there is a controlling question of law involved, and that an appeal of the Bankruptcy Court's decision will require the Supreme Court to decide whether the identity of interest exception "should be applied in conjunction with the application of Rule 15(c)." The real dispute on appeal is the Bankruptcy Court's application of Tenth Circuit law to the particular facts of this case.

In addition, the issue of entitlement to a jury trial raised in Defendant's Motion to Transfer was settled by the Supreme Court in Langenkamp v. Culp, __ U.S. __, 111 S.Ct. 330 (1990), where the court determined that if claims are submitted in a bankruptcy case, one is subjected to the jurisdiction of the Bankruptcy Court and trial by jury is waived. Defendant filed claims in the bankruptcy case.

Defendant's Motion for Leave to Appeal is denied and the case should proceed to trial.

Dated this 18 day of June, 1991.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 18 1991
Jack C. Silver, Clerk
U.S. DISTRICT COURT

PROFESSIONAL INVESTORS INSURANCE GROUP, et al,

Plaintiffs,

v.

WOODLANDS INVESTMENT CORPORATION, et al,

Defendants.

91-C-202-B

and

CHARLES STREET INVESTMENTS, INC., et al,

Plaintiffs,

v.

PROFESSIONAL INVESTORS INSURANCE GROUP, et al,

Defendants.

91-C-260-B

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed May 13, 1991, in which the Magistrate Judge recommended that Plaintiffs' Requests for Preliminary Injunction be denied. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the court has concluded that the Report and Recommendation of the Magistrate Judge should be and hereby is affirmed.

It is therefore Ordered that Plaintiffs' Requests for Preliminary Injunction are denied.

Dated this 18 day of June, 1991.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 18 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

PUBLIC SERVICE COMPANY OF OKLAHOMA, an Oklahoma corporation,	)	
Plaintiff,	)	
v.	)	No. 90-C-752-E
UNITED GAS PIPE LINE COMPANY, a Delaware corporation,	)	
Defendant.	)	

ORDER OF DISMISSAL WITH PREJUDICE

Upon consideration of the parties' Joint Stipulation of Dismissal with Prejudice, the Court hereby orders that this action is dismissed with prejudice pursuant to Federal Rules of Civil Procedures Rule 41(a)(1)(ii). It is further ordered that the parties shall bear their own respective attorneys' fees and costs incurred in connection with this action.

Dated this 18 day of June, 1991.

S/ JAMES O. ELLISON

HONORABLE JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE
FOR THE NORTHERN DISTRICT
OF OKLAHOMA

APPROVED AS TO FORM AND CONTENT:

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FILED

JUN 18 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ALLEN EUGENE SUERNAM)
)
Plaintiff,)
)
vs.) No. 90-C-1019-B
)
M/J/L/ CORP., and)
DAVID P. WARNING)
)
Defendants.)

O R D E R

Before the Court for decision is the Motion to Dismiss pursuant to Fed.R.Civ.P. 9(b) and 12(b) filed by the Defendants M/J/L Corporation and David Warning. The Court sustains the motion to dismiss in part and gives leave to the Plaintiff to amend in part.

Plaintiff's complaint in essence alleges that the Plaintiff is a minority shareholder in M/J/L Corporation ("M/J/L") by virtue of an assignment of 2500 shares of capital stock effective January 6, 1981. Plaintiff alleges that on inspection of the corporate books he discovered facts showing oppressive, unlawful, and fraudulent activities in the conduct of corporate affairs of M/J/L causing the Plaintiff substantial and detrimental financial consequences. The Plaintiff alleges mismanagement by M/J/L of corporate affairs by executive and operational personnel, failure to hold lawful, regular and timely shareholder and director meetings, continuing interference with Plaintiff's voting rights, failure to keep and

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make timely reports and records to stockholders, refusal to declare dividends, and a funneling and transfer of corporate funds and assets to unlawful purposes and payees not lawfully entitled to receive such funds and assets. Plaintiff further alleges that David Warning as a director, officer and majority stockholder authorized the unlawful, wrongful and fraudulent conduct and has breached a fiduciary duty to the corporation and to all corporate stockholders. Plaintiff alleges that the fraudulent conduct of Warning was wanton, wilful and in reckless disregard for the good of M/J/L and stockholders, and that the corporate assets and property of M/J/L are being dissipated to the detriment of the Plaintiff.

The Plaintiff prays for a full accounting, appointment of a Receiver or Special Fiscal Agent, money damages, restoration of corporate assets and funds, a temporary and permanent injunction to enjoin the continuing abuses, declaration of special dividend to Plaintiff, court supervision of activities and affairs of M/J/L, punitive damages, attorneys fees, costs and interest, and any other relief the court finds is just. He also prays for dissolution of M/J/L and/or a buy-out of Plaintiff's stock if the Court finds such action appropriate.

To dismiss a complaint and action for failure to state a claim upon which relief can be granted it must appear beyond doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957). Motions to dismiss under Fed.R.Civ.P. 12(b) admit all well-pleaded

facts. *Jones v. Hopper*, 410 F.2d 1323 (10th Cir. 1969), *cert. denied,* 397 U.S. 991 (1970). The allegations of the Complaint must be taken as true and all reasonable inferences from them must be indulged in favor of complainant. *Olpin v. Ideal National Ins. Co.*, 419 F.2d 1250 (10th Cir. 1969), *cert. denied,* 397 U.S. 1074 (1970).

DERIVATIVE SUIT

Upon review of the pleadings, the Court finds that this action is a derivative action, and not an individual action. The Plaintiff did not allege that he sustained any personal loss separate from the loss sustained by the corporation. His loss was only incidental to the corporation's loss, and therefore his rights are derivative and not direct. Plaintiff's only remedy is through a derivative action brought on behalf of the corporation. *Dobry v. Yukon Electric Co.*, 290 P.2d 135 (Okla. 1955).

Under Fed.R.Civ.P. 23.1, a derivative action may be brought by one or more shareholders to enforce a right that the corporation could properly assert but has failed to assert. The complaint shall be verified and shall allege that the plaintiff was a shareholder at the time of the transaction of which the shareholder complains, and that the action is not a collusive one to confer jurisdiction on a court of the United States. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The Plaintiff has failed

to allege that he made a demand on the corporation to correct the unlawful conduct or to allege with particularity why he did not make a demand. If the Plaintiff has made a demand, or can specifically state the circumstances which would make demand futile, the Court grants the Plaintiff leave to amend his complaint to correct the defects asserting his right to bring a derivative suit.

FRAUD

In all averments of fraud, the circumstances constituting fraud shall be stated with particularity. Fed.R.Civ.P. 9(b). Since Fed.R.Civ.P 9(b) is a special pleading requirement, it governs the procedure in federal courts in all diversity suits. *Simcox v. San Juan Shipyard*, 754 F.2d 430, 439 n.9 (1st Cir. 1985). State law, however, governs the burden of proving fraud at trial. *Id.* Fraud must be distinctly and clearly plead and will not be implied from doubtful circumstances which only awaken suspicion. *Sanditen v. Sanditen*, 496 P.2d 365, 368 (Okla. 1972). A mere allegation of fraud without detailing the facts upon which the charge is predicated is mere conclusion. *Finley v. Riley*, 91 Okla. 58, 215 P. 950, 951 (1923), *Fox v. Overton*, 534 P.2d 679, 681 (Okla. 1975).

The Plaintiff alleges fraudulent conduct in Paragraphs 7, 9, 10 and 12 of his Complaint. Paragraph 8 of the Complaint lists several activities of M/J/L and Warning alleged to be fraudulent. Plaintiff has listed general allegations of fraud. The allegations are conclusions only and are insufficient to state a cause of

action based on fraud. *Fox*, 534 P.2d at 681. Because the Plaintiff has failed to state a claim of fraud with particularity, the Court grants the Plaintiff leave to amend his complaint to plead the allegations of fraud with particularity.

APPOINTMENT OF A RECEIVER

The Defendants assert that under Oklahoma law the prerequisite to the appointment of a receiver of a corporation is the corporation's insolvency, dissolution, imminent danger of insolvency, or prior forfeiture of its corporate rights.[1] Courts

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[1]Title 18, Okla. Stat., § 1071, entitled "Appointment of custodian or receiver of corporation on deadlock or for other cause" states:

> A. The district court, upon application of any shareholder, may appoint one or more persons to be custodians, and, if the corporation is insolvent, to be receivers ... when:
>
> 1. at any meeting held for the election of directors the shareholders are so divided they have failed to elect successors to directors...
>
> 2. the business of the corporation is suffering or is threatened with irreparable injury because the directors are so divided respecting the management of the affairs of the corporation ...
>
> 3. the corporation has abandoned its business and has failed within a reasonable time to take steps to dissolve, liquidate, or distribute its assets....

Title 18, Okla. Stat., § 1106 entitled "Receivers for insolvent corporations, appointment and powers" states:

> Whenever a corporation shall be insolvent, the district court ... may upon the application of a shareholder or shareholders ... who have been registered owners for a period of not less than six months, of not less than ten percent ... appoint ... [a] receiver ....

Title 12, Okla. Stat., § 1551 entitled "Appointment of receiver" states:

> A district court can appoint a receiver ...
>
> 5. In the cases provided in this Code, and by special statutes, when a corporation has been dissolved, or is

of equity can also appoint receivers if the corporation has failed, refused or neglected to obey an order of the court[2] or where the property of the corporation was being mismanaged and in imminent danger of being lost to the stockholders through the mismanagement and fraud of its officers and no adequate remedy could be had at law.[3]

It has long been recognized that appointment of a receiver is an equitable remedy of an extraordinary nature which is to be used by a district court only where there is a showing of "fraud or [the] imminent danger of property being lost, injured, diminished in value, or squandered and where legal remedies ... appear to be inadequate...."[4] The Plaintiff has failed to allege the insolvency of M/J/L, the imminent danger of property being lost, injured or diminished in value, or the lack of adequate legal remedies. The Court grants the Plaintiff leave to amend his complaint to correct

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insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.
6. In all other cases where receivers have heretofore been appointed by the usages of the courts of equity.

[2]Title 18, Okla. Stat., § 1122. Failure of corporation to obey order of court; appointment of receiver.

[3]*Union State Bank of Shawnee v. Mueller*, 68 Okla. 152, 172 P. 650 (1918). In this case, the evidence supported the claim that the corporation's property (oil field equipment, leases, rights and privileges to oil produced) were being mismanaged and that the property would be lost to the shareholders as a direct result. The court states that "it would amount to a denial of justice if courts of equity were unable to afford a remedy where no adequate remedy could be had at law." Id., 172 P. at 652.

[4]*Mintzer v. Arthur L. Wright Co.*, 263 F.2d 823 (3rd Cir. 1959), *Union State Bank of Shawnee*, 68 Okla. 152, 172 P. 650, 652 (1918), *McDermott v. Russell*, 523 F.Supp. 347 (E.D. Pa. 1981).

the defects in his prayer for a receiver.

TEMPORARY INJUNCTION

A temporary injunction to restrain certain acts is authorized by Title 12, Okla. Stat., § 1392. The main purpose of a temporary injunction is to preserve the *status quo* pending the outcome of the case. *Penn v. San Juan Hospital*, 528 F.2d 1181, 1185 (10th Cir. 1975), *Tri-State Generation and Transmission Ass'n Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986). *Weis v. Renbarger*, 670 P.2d 609, 610 (Okla. Ct. App. 1983). A moving party has the burden of proving four factors in order to obtain a temporary injunction.[5]

The moving party must show irreparable injury. Injury is not irreparable if compensatory relief would be adequate. *Enterprise International, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472-73 (5th Cir. 1985). Plaintiff must show not only that he has been injured, but that damages are not adequate to compensate that injury. If the alleged injury can be fully compensated in money damages and the defendants are unquestionably solvent, a temporary injunction should not be granted. *Powell Briscoe, Inc. v. Peters*, 269 P.2d

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[5]Four Factors for determination of temporary injunction:
1. Moving party will suffer irreparable injury unless the injunction issues
2. The threatened injury to the moving party outweighs whatever damage the proposed injunction may cause the opposing party
3. The injunction would not be adverse to public policy
4. There is a substantial likelihood that the moving party will eventually prevail on the merits.

Lundgrin v. Claytor, 619 F.2d 61,63 (10th Cir. 1980), *Tri-State Generation v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986).

787, 791 (Okla. 1954). Not only has the Plaintiff failed to plead irreparable damage, he has failed to allege that M/J/L is insolvent and that damages would not adequately compensate his injury. Because Plaintiff did not plead several of his claims with particularity, it is not sufficiently clear for the Court to determine whether there is a probability or likelihood of recovery by the Plaintiff on the merits. *Koerpel v. Heckler*, 797 F.2d 858, 866-67 (10th Cir. 1986); *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980). The Plaintiff has not presented facts to support his request for temporary injunction. Therefore, the Defendants' Motion for dismissal of the claims of relief for temporary injunction is SUSTAINED.

The Plaintiff has 15 days to amend his complaint as to the allegations of derivative suit, fraud, and appointment of a receiver from the date of this order, or same shall be dismissed without prejudice.

IT IS SO ORDERED, this 18th day of June, 1991.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 18 1991
Jack C. Silver, Clerk
U.S. DISTRICT COURT

DAVID WAYNE FRIDAY,)
)
Plaintiff,)
)
v.) 90-C-943-B
)
OFFICER DELORES DELSO, et al,)
)
Defendants.)

ORDER

Now before the Court are the cross Motions for Summary Judgment of Plaintiff David Friday and Defendant police officers Delso and Burton.

Friday brings this suit pursuant to 42 U.S.C. §1983 alleging three counts against Tulsa Police Officers Delores Delso and Bruce Burton arising out of an interview and arrest early on the morning of March 15, 1990. Count I alleges he was arrested without probable cause. Count II alleges that as a result of the arrest and subsequent incarceration, Plaintiff suffered extreme emotional distress. Count III alleges Defendants agreed to falsify documents and falsely testify in order to deprive Plaintiff of his civil rights. Each will be considered in order.

Count I

Plaintiff alleges he was arrested without probable cause for Second Degree Burglary and False Impersonation in violation of the Fourth Amendment. The state court has found probable cause did exist. Therefore, the issue may not be relitigated in this Court. As explained in the case of *Northern Natural Gas Co. v. Grounds*, ___ F.2d ___, (10th Cir. April

29, 1991),

> **Under collateral estoppel, or issue preclusion, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.**

Defendants submit as an Exhibit the transcript of the criminal preliminary hearing (on remand) in *State v. Friday*, Tulsa County District Court Case No. CF-90-1308 (May 9, 1990) wherein the court after hearing found that probable cause had, in fact, been present when Defendants arrested Friday. Federal courts consistently accord collateral estoppel effect to issues decided by state courts. *Id.* The determination of probable cause was necessary to the state court's ruling on Friday's demurrer based on an asserted lack of probable cause for arrest. Therefore, giving preclusive effect to the state court finding, Defendants are entitled to judgment in their favor on Count I.

Count II

Here, Plaintiff alleges he suffered emotional distress as a byproduct of his arrest and incarceration. He alleges the suffering was intended by Defendants. However, one cannot, as a matter of law, hold police officers responsible in damages for emotional distress resulting from legal detention following a proper arrest under 42 U.S.C. §1983. Defendants are entitled to judgment on this count, as well.

Count III

In his final Count, Plaintiff alleges Defendants conspired together to deprive Plaintiff of his civil rights. In moving for summary judgment, Defendants submit affidavits from themselves and officers M.A. O'Brien and F. Taylor, as well as police records evidencing the details of the Second Degree Burglary Plaintiff was charged with perpetrating three days

earlier and for which Defendants placed Friday under arrest on the date in question. Plaintiff has not come forward with any evidence suggesting a question of fact exists as to a conspiracy or non-conspiracy of Defendants Delso and Burton.[1] Rather, the uncontested evidence submitted by Defendants entitles Defendants to be granted judgment in their favor as to this claim.

Conclusion

Therefore, it is Ordered that Defendants' Motion be granted, Plaintiff's Motion be denied and Judgment be entered for Defendants Delso and Burton and against Plaintiff on each claim herein.

SO ORDERED THIS 18 day of June, 1991.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[1] *See, Affidavit of D. Delso, Exhibit 2, Exhibits to Defendants' Brief in support of Motion to Dismiss and alternative Motion for Summary Judgment (filed January 11, 1991); Affidavit of B. Burton, Exhibit 3, Id.; Affidavit of M. O'Brien, Exhibit 1, Id.; Affidavit of Major F. Taylor, Exhibit 4, Id. (containing Offense Report of Burglary on March 12, 1990, Supplemental Report containing suspect descriptions of March 12, 1990 Burglary, and Offense and Arrest Reports on March 15, 1990); transcripts of testimony of Defendant Burton and Delso during criminal court proceedings had on April 5 and May 9, 1990, Exhibits 6, 7, and 9, Id.*

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 18 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

MARK ANTHONY THORNTON, Plaintiff,	)	
v.	)	90-C-748-B
DANNIE ALLEN, et al, Defendants.	)	

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed May 17, 1991 in which the Magistrate Judge recommended that the case be dismissed pursuant to 28 U.S.C. §1915(d).

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and hereby is adopted and affirmed.

It is, therefore, Ordered that the case is dismissed pursuant to 28 U.S.C. §1915(d).

Dated this 18th day of June, 1991.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 18 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

KENNETH LYNN FUNKHOUSER, Petitioner,	)	
v.	)	91-C-223-B
JAMES L. SAFFLE, et al, Respondent.	)	

ORDER

Now before the Court is Kenneth Lynn Funkhouser's Petition for Writ of Habeas Corpus. Petitioner was convicted of First Degree Murder and Robbery With Firearms (3 counts) in Tulsa County District Court, Case No. CRF-83-133 and sentenced to life imprisonment and one-hundred fifty (150) years, respectively. The convictions were affirmed on appeal in *Funkhouser v. State*, 734 P.2d 815 (Okla.Cr.App. 1987). The trial court denied Funkhouser's application for post-conviction relief and that denial was affirmed on appeal. *Funkhouser v. State*, Case No. H-90-0977 (Okla.Cr.App. October 10, 1990). Respondents concede Petitioner has exhausted his state remedies.

GROUND ONE

In his first ground for relief, Petitioner asserts he was denied due process and a fair trial. In support he points to the introduction of witness testimony through the reading of a preliminary hearing transcript. Petitioner implicitly relies on the confrontation clause of the Sixth Amendment which ordinarily requires a witness to testify live in a criminal proceeding. However, in Petitioner's case, the witness invoked the Fifth Amendment and

refused to testify at Petitioner's trial. The state then was permitted to introduce the witness's testimony from an earlier preliminary hearing where Petitioner's counsel had exercised the opportunity to cross-examine the witness.

Where a witness invokes the Fifth Amendment, he may be deemed "unavailable" to testify at trial. *California v. Green*, 399 U.S. 149, 167-68 (1970). Once unavailable, prior testimony may be admitted. *Ohio v. Roberts*, 448 U.S. 56 (1980). As the prior testimony took place at the preliminary hearing, it bears the necessary indicia of reliability. *Dres v. Campoy*, 784 F.2d 996 (9th Cir. 1986). Therefore, the asserted violation of the confrontation clause did not render Petitioner's trial unfair in this case.

Petitioner also asserts that the denial of a separate trial from his co-defendant violated his rights, and complains that the state court should not have limited the number of his peremptory challenges. However, both actions are permissible under state law and Petitioner has not made any showing of how the trial court's actions resulted in a denial of due process or an unfair trial.

Upon review, petitioner's trial was not fundamentally unfair nor was Petitioner denied due process by the state trial court.

GROUND TWO

In his second ground for relief, Petitioner points to an affidavit of state witness Larry Rollins (apparently recanting his testimony) and alleging an unfair trial and denial of due process as a result.

Traditionally, recanting witnesses are viewed with extreme suspicion in both state and federal courts. *U.S. v. Adi*, 759 F.2d 404, 407 (5th Cir. 1985). Recanted testimony

is treated as new evidence to be considered by the finder of fact - in this case the state trial court. Consequently, it has been said that, "[r]ecanted testimony does not by itself set out a claim of deprivation of the federal right to due process and therefore is not ordinarily cause for constitutional review." *Smith v. Thigpen*, 689 F.Supp. 644, 650 (S.D. Miss. 1988) (citing *Mooney v. Holohan*, 294 U.S. 103 (1935).) If Funkhouser seeks to present the recantation as grounds for relief from the conviction, his remedy is exclusively in state court. *U.S. ex rel. Milone v. Camp*, 643 F.Supp. 679, 686 N.D. Ill. (1986) (federal habeas review does not exist to review the factual accuracy of a conviction). "An allegation of recanted testimony challenges the factual accuracy of the original conviction and is a cognizable claim only under [state motion for new trial]" *Id.* Therefore, federal habeas relief on this ground must be denied.

GROUND THREE

For his final ground, petitioner asserts his convictions violate the Double Jeopardy Clause. This issue was not raised in Funkhouser's direct appeal. When raised in later proceedings (Case No. H-90-977) the Oklahoma Court of Criminal Appeals refused to consider the merits of the claim applying the state's procedural bar. Funkhouser explained the cause for the failure to raise it on direct appeal is his appointed attorney's failure to raise all the grounds Petitioner desired to be raised on appeal. This explanation does not constitute sufficient "cause" for this Court to ignore the state's procedural bar. *Murray v. Carrier*, 477 U.S. 478 (1986) ("mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default"). Consequently, this Court must respect the state

procedural bar and hereby refuse to address the merits of Petitioner's third ground for habeas relief.

CONCLUSION

The Court hereby finds that Petitioner has not raised grounds sufficient for federal habeas corpus relief. Therefore, the Petition for a Writ of Habeas Corpus is DENIED.

SO ORDERED THIS 18th day of June, 1991.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT WALKER SHARP; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma; and LINDA DALE SHARP,

Defendants.

FILED

JUN 18 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 90-C-215-E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 18 day of June, 1991. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, Robert Walker Sharp and Linda Dale Sharp, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Robert Walker Sharp, acknowledged receipt of Summons and Amended Complaint on or about July 27, 1990; that the Defendant, Linda Dale Sharp, was served with Summons and Amended Complaint on June 6, 1990; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 21, 1990; and that

Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 19, 1990.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on April 9, 1990; that the Defendant, Robert Walker Sharp, through his attorney M. Allen Core filed a Request for Extension of Time on August 15, 1990 but has failed to answer and his default has therefore been entered by the Clerk of this Court; and that the Defendant, Linda Dale Sharp, has failed to answer and her default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> The South Twenty-two (22) feet of the West Half (W/2) of Lot One (1) and the North Twenty-eight (28) feet of the West Half (W/2) of Lot Two (2), Block Ten (10), CITY VIEW ADDITION, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on October 12, 1987, the Defendant, Robert Walker Sharp, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, his mortgage note in the amount of $16,450.00, payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, Robert Walker Sharp, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated October 12, 1987, covering the above-described property. Said mortgage was recorded on October 14, 1987, in Book 5057, Page 2303, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, Robert Walker Sharp, made default under the terms of the aforesaid note and mortgage by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Robert Walker Sharp, is indebted to the Plaintiff in the principal sum of $16,342.41, plus interest at the rate of 10 percent per annum from December 1, 1988 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $23.48 ($20.00 docket fees, $3.48 fees for service of Summons and Amended Complaint).

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that the Defendant, Linda Dale Sharp, is in default and therefore has no right, title, or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Robert Walker Sharp, in the principal sum of $16,342.41, plus interest at the rate of 10 percent per annum from December 1, 1988 until judgment, plus interest thereafter at the current legal rate of 6.09 percent per annum until paid, plus the costs of this action in the amount of $23.48 ($20.00 docket fees, $3.48 fees for service of Summons and Amended Complaint), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums of the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, and Linda Dale Sharp, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Robert Walker Sharp, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney

KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

FILED

JUN 18 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOBBY LEE RHOADS AND ANNA MAXINE RHOADS,	)	
Plaintiffs,	)	M-1417 ASB(I) No. _____
v.	)	Case No. 90-C-290-B
FIBREBOARD CORPORATION, et al.,	)	
Defendants.	)	

STIPULATION AND ORDER DISMISSING
DEFENDANT THE FLINTKOTE COMPANY

COME NOW Plaintiffs, through their attorneys, and individual Defendant The Flintkote Company through its attorneys, and do hereby stipulate that this case is "settled and dismissed with prejudice as to Defendant, The Flintkote Company only, each party to bear its own costs," and said action is to remain pending against other named Defendants.

IT IS SO ORDERED.

S/ THOMAS R. BRETT

JUDGE

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

APPROVED:

Attorneys for Plaintiffs

Attorneys for The Flintkote Company

4920H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNIT CORPORATION, Plaintiff,	)	
v.	)	No. 87-C-903-E
MELLON BANK, N.A., Defendant.	)	

FILE
JUN 18 1991
Jack C. Silver, Cler
U.S. DISTRICT COU

JOINT DISMISSAL WITH PREJUDICE

The parties to this action, Unit Corporation and Mellon Bank, N.A., hereby stipulate, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, to the dismissal of the claims and the counterclaims asserted herein, the dismissal of such claims and counterclaims to be with prejudice, each party to bear its own attorneys' fees and costs.

DOERNER, STUART, SAUNDERS, DANIEL & ANDERSON

By: Richard P. Hix
Richard P. Hix OBA#4241
320 S. Boston, 5th Floor
Tulsa, Oklahoma 74103

Attorneys for Plaintiff, Unit Corporation

REED, SMITH, SHAW & McCLAY

By: Lawrence E. Flatley
Lawrence E. Flatley
P.O. Box 2009
Pittsburgh, PA 15230-2009

Attorneys for Defendant, Mellon Bank, N.A.

FILED

JUN 18 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TERRY DEWAYNE BLANKENSHIP, Petitioner,	)	
vs.	)	No. 90-C-427-E
MICHAEL CODY, et al., Respondents.	)	

O R D E R

The Court has for consideration the Report and Recommendation of the Magistrate filed April 2, 1991. After careful consideration of the record and the issues, including the briefs and memoranda filed herein by the parties, the Court has concluded that the Report and Recommendation of the Magistrate should be and hereby are adopted by the Court.

IT IS THEREFORE ORDERED that Petitioner's Application for Writ of Habeas Corpus is dismissed.

ORDERED this 18th day of June, 1991.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. EUGENE GODWIN; COUNTY TREASURER, Creek County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma, Defendants.	CIVIL ACTION NO. 90-C-828-B

FILED
JUN 18 1991
Jack C. Silver, Clerk
U.S. DISTRICT COURT

ORDER

Upon the Motion of the United States of America, acting on behalf of the Farmers Home Administration, by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and for good cause shown it is hereby ORDERED that this action shall be dismissed without prejudice and the sale set for June 25, 1991 be canceled.

Dated this 18th day of June, 1991.

Thomas R. Brett
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

TONY M. GRAHAM
United States Attorney

Phil Pinnell

PHIL PINNELL, OBA #7169
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

PP/esr

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 18 1991
Jack C. Silver, Clerk
U.S. DISTRICT COURT

THRIFTY RENT-A-CAR SYSTEM, INC.,	)	
Plaintiff,	)	
v.	)	90-C-146-B
DYNASTY AUTO RENTAL AND LEASING, INC., et al,	)	
Defendants.	)	

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed May 14, 1991, in which the Magistrate Judge recommended that the Application of Plaintiff, Thrifty Rent-A-Car System, Inc. for Costs of Settlement Conference be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the court has concluded that the Report and Recommendation of the Magistrate Judge should be and hereby is affirmed.

It is therefore Ordered that the Application of Plaintiff, Thrifty Rent-A-Car System, Inc. for Costs of Settlement Conference is granted. Plaintiff is hereby awarded its costs, including reasonable attorney fees associated with the aborted settlement conference, in the amount of $1,290.00.

Dated this 18th day of June, 1991.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 18 1991
JACK C. SILVER, CLERK
U.S. DISTRICT COURT

JAY D. MILLER, an individual, Plaintiff, vs. L.K. COMSTOCK AND COMPANY, INC., a New York corporation, Defendant and Third-Party Plaintiff, vs. RAY ALLEN, GARY GREGORY and THE ESTATE OF LOWELL STEWART DECEASED, Third-Party Defendants.	)	Case No. 88-C-1484-B

AMENDMENT TO JUDGMENT

Pursuant to Order entered simultaneously herewith the Court enters an Amendment To Judgment, including in the original Judgment entered March 1, 1991, the following paragraph:

> Based upon previous agreement of the parties, Judgment is further entered in favor of Plaintiff Jay D. Miller and against Defendant L.K. Comstock and Company, Inc. in the amount of $840.00, with pre-judgment interest on such sum at the rate of 11.71% per annum (12 O.S. §727) from October 13, 1988, to February 28, 1991, and post-judgment interest at the rate of 6.21% (28 U.S.C. §1961) from February 28, 1991, until paid, in confession of Plaintiff's claim under 29 U.S.C. §1001, the Employment Retirement Income Security Act (ERISA).

DATED this 18th day of June, 1991.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 17 1991

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

UNITED STATES OF AMERICA)
)
v.) 90-C-1047-B
)
MICHEAL D. FINCH,)
)
Movant.) 89-CR-101-B

O R D E R

This matter comes on for consideration upon a Motion pursuant to 28 U.S.C. §2255 filed by Micheal D. Finch, Movant.

Movant, Micheal D. Finch (Finch), entered a plea of guilty, pursuant to a plea agreement entered into September 20, 1989, to a single count Indictment charging under 21 U.S.C. § 846, 841 (a)(1), 841(b)(1)(A)(iii) a conspiracy to possess with intent to distribute and to distribute 50 grams or more of cocaine-base. Movant was sentenced to seven years imprisonment followed by five years of supervised release.

Movant now complains by motion under §2255 that his lawyer, Tom Bruner, Assistant U.S. Attorney John Morgan, F.B.I. Agent Patrick Lynch and Tulsa Police Department officer Kay Orndorff all had come to an agreement, prior to his plea agreement, that Finch "would be charged with a phone count along with a time cut after a year." All parties to this alleged agreement have, by written statement, denied the existence of such agreement. Because Movant is proceeding *pro se* the Court will interpret his pleadings as

liberally as possible. **Downing v. New Mexico State Supreme Court**, 339 F.2d 435 (10th Cir. 1964).

The gravamen of Movant's Ground One (Conviction obtained without understanding of consequences of plea of guilty) is that Movant expected a lighter sentence than what he received. Movant entered a guilty plea as a result of a plea agreement with the government. The agreement was embodied in a letter prepared by and signed by the Assistant U.S. Attorney involved herein, John S. Morgan. The agreement was also signed by Finch and his two attorneys, William D. Lunn[1] and Tom Bruner. In the plea agreement Movant was advised that the punishment provided for by the applicable statute was not less than 10 years or more than life imprisonment, a $4,000,000 fine, a $50.00 special assessment, and a minimum term of three years to five years supervised release.

Movant was further advised he would be sentenced in accord with the Sentencing Guidelines. Finch was also advised that after an offense level was determined, "additional calculations, whether reductions or increases, will be left solely to the determination of the sentencing judge." Finch was advised that timely acceptance of responsibility would allow a two-point reduction of the offense level but that the sentencing judge (this Court) would make the determination of whether there had been such "timely acceptance". The agreement further provided:

> Accordingly, the government is willing to enter into the following agreement with your client, Michael D. Finch concerning investigations being conducted by various law enforcement agencies. In return for your client's

---

[1] Lunn has also signed a written statement that denies the existence of the agreement alleged by Movant.

> cooperation and truthful testimony before any federal grand jury investigating illegal matters, as well as truthful testimony in any trial, including the current charge, against any defendant, or in any trial that may arise out of any case or any investigation or related investigations in other federal districts, and his plea of guilty to the above referenced Indictment, the government will not subject him to additional federal criminal prosecutions for any criminal acts he committed in connection with such conspiracy, and will grant him immunity for the use of his disclosures and testimony. Additionally, the government agrees to advise the sentencing court, by motion before sentencing and/or after sentencing pursuant to Rule 35(b), F.R.C.P., that the defendant has made a good faith effort to provide substantial assistance (§5K1.1), if he has in fact done so, thereby allowing the court to a downward departure from the guidelines, which may in fact go below the 10 year minimum sentence.
>
> The actual sentence rendered by the district court following your client's plea of guilty remains in the sole discretion of the trial judge and the government cannot predetermine what would be the final result of the court's evaluation and decision after all factors are considered.

At the hearing when Finch changed his plea to one of guilty, the plea agreement, with the above language therein, was presented to this Court. It is the consistent practice of this Court to make inquiry whether such agreement was the extent of the defendant's agreement with the government and such was done in this case. It is the further consistent practice of this Court to advise plea-agreement defendants that the ultimate determination of the sentence would be up to the Court, the Court not having to follow any recommendation of the government. That also was done in this case and Finch acknowledged his understanding thereof.[2]

Ground Two (Breach of Plea Agreement) and Ground Three (Ineffective Assistance of Counsel) relate essentially to the

---

[2] See Reporter's Transcript of Proceedings of Change of Plea Hearing on October 10, 1989, filed February 19, 1991.

matters discussed in Ground One. All three grounds are considered by the Court as one issue.

At sentencing, the government made a motion pursuant to Guideline § 5K1.1, advising this Court that Finch had given substantial assistance to the government in its investigation and prosecution of others who have committed federal offenses. The Court determined the guideline range was from 151 months to 188 months. Because of Finch's assistance to the Government this Court departed downward and imposed a sentence of 84 months followed by five years of supervised release. Finch said nothing at the hearing to indicate that he had been promised by the government, or anyone else, that he would receive a lesser sentence than that received.

Plea agreements are in essence contracts between parties and contract law analogies are appropriate. **United States v. Calabrese**, 645 F.2d 1379 (10th Cir. 1981) *cert.den.* 451 U.S. 1018, and *cert.den.* 454 U.S. 831; **United States v. Stemm**, 847 F.2d 636 (10th Cir. 1988); **United States v. Reardon**, 787 F.2d 512 (10th Cir. 1986). It is black letter contract law that the terms of a clear and unambiguous written contract cannot be changed by parol evidence. **Schwartz v. Slawter**, 751 F.2d 317 (10th Cir. 1984); **Percival Constr. Co. v. Miller & Miller Auctioneers**, 532 F.2d 166 (10th Cir. 1976). Plea agreements have been encompassed within that fundamental rule of contract law. **United States v. Rutledge**, 900 F.2d 1127 (7th Cir. 1990) *cert. den.* 1115 S.Ct. 203; **United States v. Fry**, 831 F.2d 664 (6th Cir. 1987); **Hartman v. Blankenship**, 825 F.2d 26 (4th Cir. 1987); **Baker v. United States**, 781 F.2d 85 (6th Cir., 1986) *cert. den.* 479 U.S. 1017 (1986); **Blackledge v. Allison**, 431 U.S. 63 (1977).

In **Blackledge**, the Supreme Court held that written contract provisions declaring that the contract contains the complete agreement of the parties, and that no prior or outside agreements exist, do not absolutely bar later proof that such additional agreements exist and should be validated. The Supreme Court concluded such provisions carry great weight but can and should be set aside on grounds of fraud, mistake, duress or any other sufficient ground for setting aside contracts. The instant matter does not fit within any **Blackledge** exception.

The Court concludes Finch's claim is completely refuted by the plea agreement itself and the records of the guilty-plea and sentencing proceedings.[3] Movant cannot vary the plea agreement by self-serving parol evidence. The Court further concludes there is no need to hold an evidentiary hearing in this matter. **United States v. Gamble**, 917 F.2d 1280 (10th Cir. 1990).

It is the conclusion of the Court that Finch's §2255 Motion should be and the same is hereby DENIED.

IT IS SO ORDERED this 17th day of June, 1991.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

[3] Finch entered a plea of guilty on October 10, 1989, and was sentenced on December 6, 1989.

21649/msc

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 17 1991
Jack C. Silver, Clerk
U.S. DISTRICT COURT

MARY LOUISE CASEY ANDREWS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 90-C-513-B
	)	
RUBY B. BEDORE,	)	
	)	
Defendant.	)	

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 17th day of June, 1991, this matter comes on for consideration before the undersigned Judge of the District Court upon Joint Stipulation for Dismissal.

The Court being fully advised in the premises finds that the parties have fully and completely settled all claims involved in this litigation and therefore finds that this matter should be dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this matter should be and same is hereby dismissed with prejudice.

IT IS FURTHER ORDERED that each party is to bear their own attorney fees, Court costs and expenses.

IT IS SO ORDERED.

S/ THOMAS R. BRETT

U.S. DISTRICT JUDGE

APPROVED AS TO FORM & CONTENT:

STEPHEN C. WOLPE
Attorney for Plaintiff

EUGENE ROBINSON, Attorney for
Ruby B. Bedore

MARK HANSON, Attorney for
Ruby B. Bedore

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 17 1991

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
v.	)	89-C-957-B ✓
	)	957-B
JAMES CHARLES BOONE	)	
	)	88-CR-122-B
Movant.	)	

SUPPLEMENTAL ORDER

This Order is supplemental to the Order entered herein by this Court on March 30, 1990, denying Movant's Motion under § 2255 as to all matters except Defendant's contention that the Government's attempted forfeiture of the real property (including the trailer) was a violation of the plea agreement entered into between Movant and the Government in 88-CR-122-B, Northern District of Oklahoma.

In the Court's earlier Order the following was stated:

> As to Defendant's contention that the Government's attempted forfeiture of the real property(including the trailer), claimed by Defendant's wife and two mortgage lien holders, is a violation of the plea agreement, the Court will reserve ruling on this matter pending resolution of the civil forfeiture case. If the real property forfeiture is resolved in favor of Willadean Boone and the two mortgage holders and against the Government, the Court will consider that issue moot as it now DENIES all collateral issues raised by Defendant relative to the plea agreement as impacted by real property forfeiture attempt of the Government. Movant has listed 18 facts under paragraph 17 of the Motion. Among these facts Movant presents the argument that mere dropping of the real property forfeiture by the Government or a decision favorable to Willadean Boone is not sufficient. Movant urges he should be re-sentenced and given less time in view of the circumstances. The Court, at this time, does not share that view.

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In the forfeiture case before Judge Ellison a Stipulation For Compromise was entered May 17, 1990, wherein Wiladean Boone, individually and as Guardian ad litem for James Charles Boone, Jr., her attorney, John Mark Young, and Catherine Depew, Assistant United States Attorney, agreed *inter alia* that upon payment of $2500 and waiver of any claim to $10,000 in funds seized by the Government (part of the subject matter of the forfeiture action) by Wiladean Boone the Government would initiate no further prosecutions of a civil nature against James Charles Boone and/or Wiladean Boone for any activity occurring prior to the date of the signing of the settlement agreement. The parties further agreed that the Government would "initiate no confiscation, forfeiture or levies against all presently owned real or personal property of James Charles Boone, Wiladean Boone and James Charles Boone, Jr. for any activity occurring [prior] to the date of signing of this settlement agreement." An Agreed Judgment Of Forfeiture was entered in January, 1991, based upon the Stipulation for Compromise.

The Court is cognizant that James Charles Boone was not a signatory party to the Stipulation for Compromise nor did he approve the Agreed Judgment Of ForFeiture as did Wiladean Boone. Notwithstanding, the Court, in its earlier Order, denied all collateral issues raised by Movant relative to the plea agreement "as impacted by real property forfeiture attempt of the Government." The Court concluded then, and concludes now, that any disposition of the real property moots that issue and serves as no predicate for the imposition of a lessened or altered sentence of confinement.

The Court concludes Movant's §2255 Motion should be and the same is DENIED in all respects.

IT IS SO ORDERED this 17th day of June, 1991.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 14 1991
U.S. DISTRICT COURT CLERK

ISIAH E. KEYS, JR., Plaintiff,	)	
-vs-	)	No. 89-C-904-B
MISSOURI PACIFIC RAILROAD COMPANY, doing business as UNION PACIFIC RAILROAD COMPANY, a foreign corporation, Defendant.	)	

STIPULATION OF DISMISSAL

COMES NOW the Parties to the above-captioned action, by and through their respective attorneys, and stipulate that the above action has been compromised and settled and that the action is to be dismissed with prejudice as to its refiling.

Respectfully submitted,

Edwin W. Ash, OBA #0347
ASH, CREWS & REID
5508 South Lewis Avenue
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(918) 742-0282

ATTORNEYS FOR PLAINTIFF

Tom L. Armstrong, OBA #329
David S. Landers, OBA #12367
Jeannie C. Henry, OBA #12331
TOM L. ARMSTRONG & ASSOCIATES
601 South Boulder, Suite 706
Tulsa, Oklahoma 74119
(918) 587-3939

ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CHESTER EASTHAM,

Plaintiff,

v.

GARY MAYNARD,

Defendant.

90-C-342-E

FILED

JUN 13 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

ORDER

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed July 20, 1990 in which the Magistrate Judge recommended that Plaintiff's Motion to Dismiss Without Prejudice be granted.

No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and hereby is adopted and affirmed.

It is, therefore, Ordered that Plaintiff's Motion to Dismiss Without Prejudice is granted.

Dated this 13th day of June, 1991.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM H. BEARD, PATTY JO BEARD; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma; PITTSBURG STATE UNIVERSITY NATIONAL DIRECT STUDENT LOAN,

Defendants.

FILED

JUN 13 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 90-C-484-E

AMENDED JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 13 day of June, 1991. The Plaintiff appears by Tony M. Graham, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, Pittsburg State University National Direct Student Loan, appears by Nancy L. Ulrich, Assistant Attorney General, and the Defendants, William H. Beard and Patty Jo Beard, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, William H. Beard, was served with Summons and Amended Complaint on October 12, 1990; that the Defendant, Patty Jo Beard, was served with Summons and Amended Complaint on December 10, 1990; that Defendant, Pittsburg State University National Direct Student Loan, was served with

Summons and Amended Complaint on December 12, 1990; that Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on June 8, 1990; and that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on June 11, 1990.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, filed his Answer on June 21, 1990; that the Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on June 21, 1990; that the Defendant, Pittsburg State University National Direct Student Loan, filed its Answer on November 7, 1990; and that the Defendants, William H. Beard and Patty Jo Beard, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on October 23, 1990, William Hugh Beard and Patty Jo Beard filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 90-03219-C, and were discharged on February 20, 1991.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Twenty-nine (29), Block Three (3), INDIAN SPRINGS PARK ADDITION, an addition in Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on January 24, 1986, the Defendants, William H. Beard and Patty Jo Beard, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of $64,000.00, payable in monthly installments, with interest thereon at the rate of 10.5 percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, William H. Beard and Patty Jo Beard, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated January 24, 1986, covering the above-described property. Said mortgage was recorded on January 27, 1986, in Book 4921, Page 364, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, William H. Beard and Patty Jo Beard, made default under the terms of the aforesaid note and mortgage, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, William H. Beard and Patty Jo Beard, are indebted to the Plaintiff in the principal sum of $62,929.39, plus interest at the rate of 10.5 percent per annum from March 1, 1989, until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $56.20 ($20.00 docket fees, $36.20 fees for service of Summons and Complaint).

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $4.00 which became a lien on the property as of July 7, 1988. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Pittsburg State University National Direct Student Loan, has a lien on the property which is the subject matter of this action by virtue of a Journal Entry of Judgment, SC-90-1132, filed on April 11, 1990, in the District Court in and for Tulsa County in the amount of $1,196.19 with interest at the rate of 3% per annum from February 1, 1990 until paid, together with an attorney's fee in the sum of $119.61 and all the costs of this action. This Judgment was recorded in Book 5247 on Pages 143-44 in the records of Tulsa County, Oklahoma. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment in rem against the Defendants, William H. Beard and Patty Jo Beard, in the principal sum of $62,929.39, plus interest at the rate of 10.5 percent per annum from March 1, 1989 until judgment, plus interest thereafter at the current legal rate of 6.09 percent per annum until paid, plus the costs of this action in the amount of $56.20 ($20.00

docket fees, $36.20 fees for service of Summons and Complaint). plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of $4.00 for personal property taxes for the year 1987, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Pittsburg State University National Direct Student Loan, have and recover judgment in the amount of $1,196.19 with interest at the rate of 3% per annum from February 1, 1990 until paid, together with an attorney's fee in the sum of $119.61 and all the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, has no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, William H. Beard and Patty Jo Beard, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, County, Oklahoma, in the amount of $4.00 for personal property taxes which are currently due and owing.

Fourth:

In payment of Defendant, Pittsburg State University National Direct Student Loan, in the amount of $1,196.19 with interest at the rate of 3% per annum from February 1, 1990 until paid, together with an attorney's fee in the sum of $119.61 and all costs of this action.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any

right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

TONY M. GRAHAM
United States Attorney

KATHLEEN BLISS ADAMS, OBA #13625
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

NANCY L. ULRICH
Assistant Attorney General
Attorney for Defendant,
Pittsburg State University

Amended Judgment of Foreclosure
Civil Action No. 90-C-484-E

KBA/esr

FILED

JUN 11 1991

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DANIEL I. CULLEY, Plaintiff,	)	
v.	)	No. 90-C-862-C
HILLCREST MEDICAL CENTER and ANNIE VENUGOPAL, M.D., Defendants.	)	

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 10 day of June, 1991, it appearing to the Court that this matter has been resolved between the parties, this case is herewith dismissed with prejudice to the refiling of a future action.

The parties agree to bear their own costs.

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity,	)	
Plaintiff,	)	
vs.	)	No. 89-C-144-E
HENDERSON HILLS SHOPS, INC., an Oklahoma corporation, C. A. HENDERSON, an individual, WALTER TULLOS, an individual, TILLMAN M. HERSHBERGER, an individual, RAYMOND DOYAL HOOVER, an individual, and ROBERT J. NALE, an individual,	)	
Defendants.	)	

FILED

JUN 11 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSURE ORDER

Upon joint motion of the parties and for good cause therein shown, it is hereby Ordered as follows:

A. This action is continued under administrative closure for sixty (60) days from the date of the filing of this Order, without prejudice to the parties' respective rights to reopen this action on or before that time, if further litigation becomes necessary;

B. If no motion to reopen or motion to extend the administrative closure is filed on or before the expiration of the 60th day, then the parties' claims, if any, against each other herein are hereby dismissed with prejudice, with each party to bear their own attorney's fees, costs and expenses.

Dated this 10 day of June, 1991.

S/ JAMES O. ELLISON

United States District Judge
Northern District of Oklahoma

060391vl-LZ6:Admin.Ord

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	Case No. 90 C-850-E
RICKEY D. ROBISON, a/k/a RICK ROBISON; et al., Defendants.	)	

FILED

JUN 11 1991

Jack C. Silver, Clerk
U.S. DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT

Now on this 10 day of June, 1991, the above cause comes on for trial pursuant to regular assignment. The Defendant, Union Mortgage Company, Inc., appeared by its attorneys of record, Bright, Zrenda & Dunn, through Sheldon B. Swan, and the Defendant, Rickey D. Robison, a/k/a Rick Robison, appeared not, either in person or by attorney.

The Court examined the pleadings, process and files in this cause, and being fully advised in the premises finds that due and regular service of summons with a copy of the Amended Answer and Cross-Claim filed herein has been made upon the Defendant, Rickey D. Robison, a/k/a Rick Robison, as provided by law, and that said summons and said service thereof is legal and regular in all respects.

That the answer day in said Cross-Claim has expired, and that said Defendant, Rickey D. Robison, a/k/a Rick

Robison, has failed to answer or otherwise plead or appear herein and is in default and is hereby adjudged in default.

The Court further finds from the Affidavit as to Military Service on file herein, and from other evidence, that the Defendant, Rickey D. Robison, a/k/a Rick Robison, hereinabove found to be in default, is not in the military service of the United States of America, as provided by the Soldiers and Sailors Civil Relief Act of 1940, as amended, and that no bond should be required under said Act, and it is hereby ordered that Union Mortgage Company, Inc. proceed to trial against said Defendant.

Thereupon, the parties so appearing as set forth above, the Defendant, Union Mortgage Company, Inc. introduced the Note and Mortgage herein sued upon, and being fully advised, the Court finds generally in favor of Union Mortgage Company, Inc. and against the Defendant, Rickey D. Robison, a/k/a Rick Robison, and that the allegations of said Cross-Claim filed herein are true.

The Court further finds that defaults have occurred under the terms and conditions of said Note and Mortgage as alleged in said Cross-Claim and that the Plaintiff is entitled to a foreclosure of the Mortgage sued upon in this cause, as against the Defendant, Rickey D. Robison, a/k/a Rick Robison, in and to this cause.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Defendant, Union Mortgage Company, Inc., have

and recover judgment in personam against the Defendant, Rickey D. Robison, a/k/a Rick Robison, in the sum of $6,902.78, plus accrued interest in the amount of $2,438.02 through November 8, 1990, plus interest accrued from and after November 8, 1990, at 17.98% per annum, until paid; and $1,200.00 for attorney fees.

S/ JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED:

BRIGHT ZRENDA & DUNN

By: _____
Sheldon B. Swan, OBA #11538
2800 First Oklahoma Tower
210 West Park Avenue
Oklahoma City, Oklahoma 73102
(405) 235-8318

Attorneys for Defendant,
UNION MORTGAGE COMPANY, INC.

UNITED STATES OF AMERICA

TONY M. GRAHAM
United States Attorney

By: _____
Kathleen Bliss Adams
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(918) 581-7463

Attorneys for Plaintiff

FILED
IN OPEN COURT

JUN 1 1 1991

Jack C. Silver
Clerk, U.S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JOHN H. CONNOR and MARSHA CONNOR, individually and as husband and wife,	)	
Plaintiffs,	)	
v.	)	90-C-241-C
GENERAL CABLE COMPANY, APPARATUS DIVISION, a Division of GK Technologies, Inc.,	)	
Defendant,	)	
and	)	
MID-CONTINENT CASUALTY COMPANY,	)	
Intervenor.	)	

JUDGMENT

Judgment is entered in favor of defendant, General Cable Company, Apparatus Division, and against plaintiffs, John H. Connor and Marsha Connor.

Dated this 12th day of June, 1991.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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